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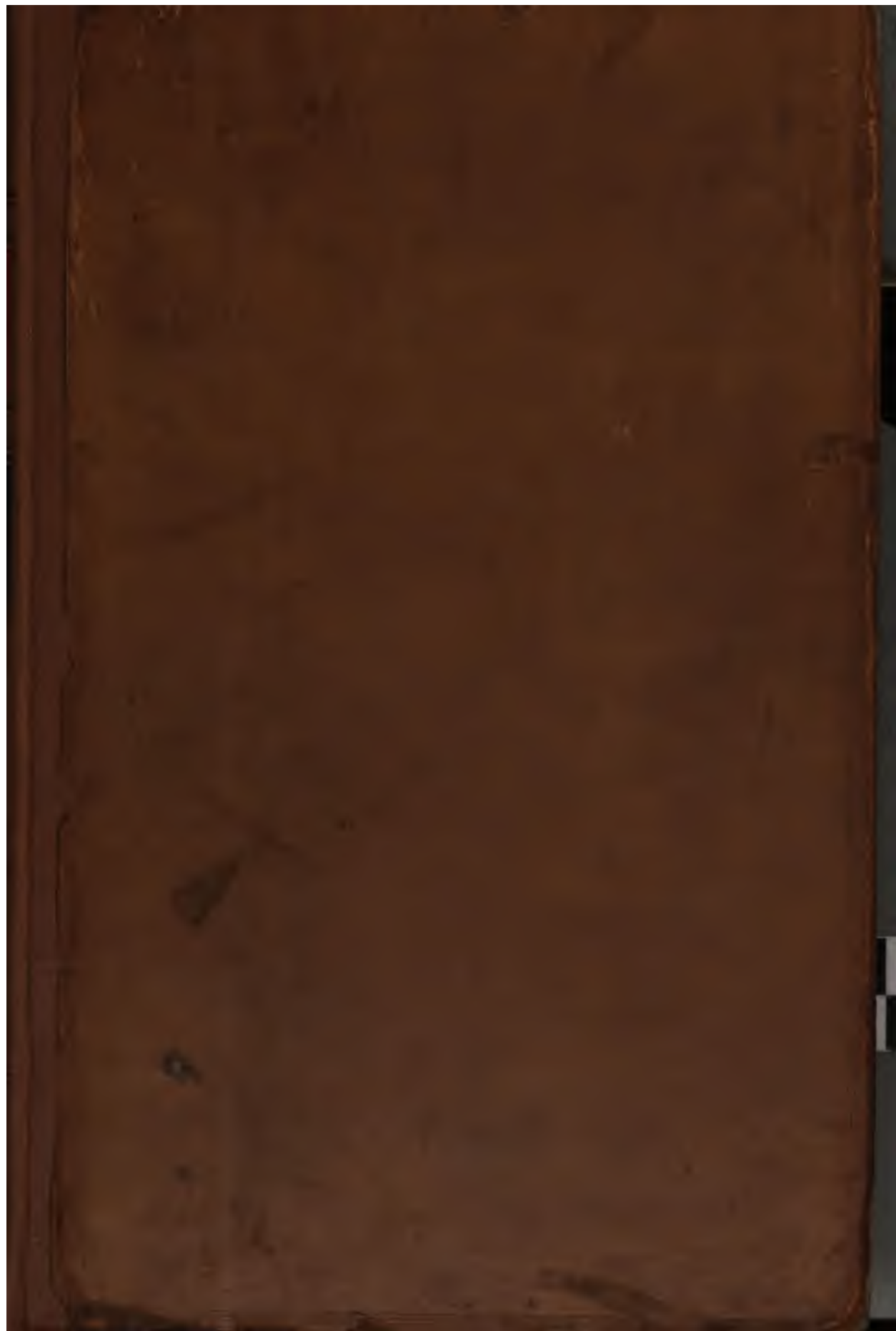
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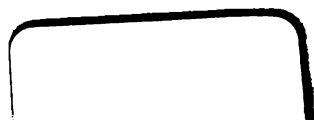
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OF
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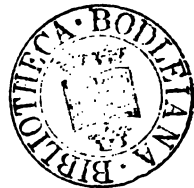
BY
THE RIGHT HON. SIR JOHN LEACH,
Vice-Chancellor of England.

BY
NICHOLAS SIMONS AND JOHN STUART,
OF LINCOLN'S-INN, ESQUIRES, BARRISTERS AT LAW.

VOL. II.
1824, 1825, 1826—5, 6 & 7 Geo. IV.

L O N D O N :
PRINTED FOR J. & W. T. CLARKE,
LAW BOOKSELLERS AND PUBLISHERS,
PORTUGAL STREET, LINCOLN'S INN.

1827.



**Luke Hansard & Sons,
near Lincoln's-Inn Fields.**

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| Lord GIFFORD | | |
| Sir JOHN LEACH | - - | Vice-Chancellor. |
| Sir ROBERT GIFFORD | } - - | Attornies General. |
| Sir J. S. COPLEY | | |
| Sir J. S. COPLEY | } - - | Solicitors General. |
| Sir C. WETHERELL | | |

The following Cases, reported in this and the preceding
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Wellman - v. Bowring - - vol. 1. page 24.
 Lord Selsey v. Rhoades * - - — 2. — 41.
 Rothwell - v. Rothwell - - — 2. — 217
 Hodgson - v. Dean - - - — 2. — 221.

* Affirmed in the House of Lords.

ERRATA.

Page 130, marginal note, line 14, after "£. 42," the words "*per acre*" are omitted.
 Page 218, marginal note, line 7, after "*ordered*," the words "*on motion*" are omitted.
 Page 228, line 26, for "*a creditor*," read "*an executor*."
 Page 440, line 24, for "*in favor of*," read "*against*."
 line 25, for "*purchaser*" read "*vendor*."
 line 26, for "*In support of*," read "*against*."
 The page numbered 590 ought to have been numbered 580.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

BARFIELD v. NICHOLSON.

1824.
1st, 19th & 20th
February.

Copyright.

THIS was a Bill to restrain the Defendants from printing and publishing a Work intitl'd *The Practical Builder*, or any other Work prejudicial to the Sale of *The Architectural Dictionary*, a Work belonging to the Plaintiff.

Copyright may be either in respect of the Matter or the Arrangement; but no Property can be acquired in an Article copied from a prior Work.

The Defendant *Nicholson* having written a Work called *The Architectural Dictionary*, by an Indenture dated the 3d of March 1821, made between him of the one part, and the Plaintiff of the other part, in consideration of the sum of 250*l.* sold and assigned to the

An Author having sold the Copyright of a Work published

under his own Name, and covenanted with the Purchaser not to publish any other Work to prejudice the Sale of it; *semble*, that another Publisher, who had no Notice of this Covenant, will be restrained from publishing a Work subsequently purchased by him from the same Author, and published under his Name, on the same Subject, but under a different Title, and though there be no Piracy of the first Work.

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Plaintiff all his Copyright in the Work; and by the same Indenture he for himself, his Executors and Administrators, covenanted, promised and agreed, to and with the Plaintiff, his Executors, Administrators and Assigns, that he would not write or publish, or cause or procure to be written or published, any abridgment of that Work, or any part thereof, or any other kind of Publication, which might prove prejudicial or detrimental to the sale of *The Architectural Dictionary*, and that he would not in any manner, either directly or indirectly, impede the circulation or publication thereof.

The Bill, after stating this Indictment, alleged that *Nicholson*, in violation of his Covenant, had, in July 1823, prepared and written a Work, called *The Practical Builder*, which contained, in substance, the greatest part of the information comprised in *The Architectural Dictionary*, and had also introduced into it many of the Designs and Plans, and a part of the substance of the Letter-press of *The Architectural Dictionary*. It also stated, that the Defendant, *Kelly* who was a Bookseller, had printed, published and sold many thousand copies of *The Practical Builder*, under the direction of *Nicholson*; and that *Nicholson* and *Kelly* were Joint-owners and Proprietors of *The Practical Builder*. The Plaintiff stated himself to be the sole Owner of the Copyright of *The Architectural Dictionary*.

The Bill charged that many of the Plans and Designs in the Plates of *The Architectural Dictionary* were original, and had never been published in any other Work; and that *Nicholson* had introduced into *The Practical Builder*, and had printed and published in that Work, a great number of these original Plans

and Designs; and had even acknowledged that the substance of the Letter-press of *The Practical Builder* was the same as that of *The Architectural Dictionary*: That the Plaintiff had, previously to that Publication, derived great Profits from the Sale of *The Architectural Dictionary*, but that the Sale of that Work had been greatly injured by the Publication of *The Practical Builder*.

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Soon after the Bill was filed, the Court was moved, on the part of the Plaintiff, for an Injunction to restrain the publication, *The Practical Builder*. In support of this Motion, an Affidavit was filed by the Plaintiff to the truth of the Allegations in the Bill. There were also Affidavits of an Architectural Bookseller and a Builder in support of the Plaintiff's Case, stating that they had compared certain Plates in *The Practical Builder*, specified in the Affidavits, with the Plates in *The Architectural Dictionary*, and that, in their judgment, the Designs and Plans contained in the Plates in *The Practical Builder*, were similar to and copied from the corresponding Designs and Plans in the Plates in *The Architectural Dictionary*; and that, although many of them varied slightly, yet that they were substantially the same, conveying the same information, and illustrating the same subjects; that *The Practical Builder* purported to give information on the same subjects, and was written on the same principle, and, in many cases, copied from *The Architectural Dictionary*, and was calculated altogether to supersede that Work.

On this Motion, the *Vice-Chancellor* granted an Injunction *ex parte*; observing, that the Covenant by

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Nicholson, in the Deed of 1821, was, *primâ facie*, sufficient to entitle the Plaintiff to an Injunction *ex parte*, without entering into the question of Piracy.

The Defendants afterwards put in their Answers. The Answer of *Kelly* stated that *The Architectural Dictionary*, when first published, was not an original Work, either in its Letter-press or Plates, though it might contain some original Letter-press, Designs and Plates; but that the original matter formed a very small portion of the whole Work; that, until this Bill was filed, he was wholly unacquainted with the arrangement between the Plaintiff and *Nicholson*, and with the Deed of 1821; that, in the beginning of 1821, he, being a Publisher and Bookseller in extensive business, for his own sole and exclusive benefit planned the Work or Publication called *The Practical Builder*; that the Defendant *Nicholson*, being an Architect of great eminence, in consequence of the reputation which he had acquired by various Publications on Carpentry and Architecture, he was induced to employ him occasionally in the composition of *The Practical Builder*, and to apply to him to use his name as the Author of the Work, although, in fact, he was only occasionally employed to write some parts of it, and to design some of the Figures; but that he (*Kelly*) employed other men of science to write the residue of the Letter-press, and employed *Michael Angelo Nicholson*, (the Son of the Defendant *Nicholson*,) to design the residue of the Figures; and that, of the forty-six Plates already published, *M. A. Nicholson* had designed twenty-two, and the Defendant, *Nicholson*, twenty-four; and that the whole of these Designs were brought to and paid for by him (*Kelly*) as original Designs, and that the original Drawings of the Designs, so brought to him,

were still in his possession, ready to be produced ; that, since this Bill was filed, he had been induced to inquire as to the originality of these Designs, and found that many of them were not original, but taken from Works published many years ago, the Copyright in which had long since expired, or from Works in common circulation, without any objection on the part of the Owners of such Works ; but that not one of the Designs or Drawings was copied from the Designs and Drawings of *The Architectural Dictionary*, although, on a casual inspection, a great imitation appeared between some of these Designs and Drawings and those contained in *The Architectural Dictionary* ; but that this similarity arose from the nature of the subject, and not from their being copied ; that every one of the Plates and Figures, and the Letter-press, which the Affidavits of the Plaintiff stated to be Piracies from *The Architectural Dictionary*, had, in fact, appeared in prior Works ; and he denied, to the best of his knowledge, judgment and belief, that any Passage in his Work was a Piracy of, or copied from the Plaintiff's Work ; but, on the contrary, that *The Practical Builder* was, so far as the subject would admit, an original Work. The Answer also denied that *Nicholson* was a Joint-owner in *The Practical Builder*, or in any manner interested in the produce or profits of it, and, therefore, denied that the publication of that Work was a breach or violation of the Covenant between the Plaintiff and *Nicholson*.

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The Defendant *Kelly* having put in this Answer, the Court was now moved, on his behalf, to dissolve the Injunction as against him.

Mr. *Solicitor-General*, and Mr. *Wakefield*, for the Motion.

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Mr. Heald, Mr. Sugden, and Mr. Roots, for the
Plaintiff, *contra*.

The VICE-CHANCELLOR :—

The Architectural Dictionary, and *The Practical Builder*, are plainly both Works upon the same subjects, namely, the science of Architecture and the art of Building. The question is, whether the latter Work is a Piracy upon any part of the former Work which the Author of that Work had a right to claim as his own property, in respect that it was his own composition.

Composition is either in new matter or new arrangement. The arrangement in the two Works is altogether different. In *The Architectural Dictionary* the information is scattered through the whole Work, under the head of each particular term of science or art, arranged in alphabetical order: in *The Practical Builder* the information is conveyed in the connected form of a Treatise. If there be Piracy here, it must be Piracy of the matter of *The Architectural Dictionary*. The general Answer of the Defendant is, that *The Practical Builder* was conceived and planned by him as a speculation on his own account, and that he employed various Artists in the execution of this Work, and, among others, *Nicholson* and his Son; and especially in the Plates; and that he paid for every thing as original design; and that, if it be a Piracy, he is himself imposed upon.

The Practical Builder, as far as published, consists of forty-six Plates; and the Affidavits allege that thirteen of these Plates contain one, two, three or four Figures, which are imitations of Figures contained in *The Architectural Dictionary*; and the particular Figures

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are pointed out in the Affidavits. The entire resemblance of these Figures, though in some instances denied, is generally admitted; but it is said this resemblance is no proof of imitation. The Figures of Geometry must necessarily resemble each other in all Works: and, in a great degree, this applies to the Figures of Architecture or Building, where they are descriptions of things in use, as, for instance, in one of the articles, *Roofs*. Where two Works describe the Figures of Roofs in use, they must necessarily produce resembling Figures. And the Defendant then proceeds to shew, that the Figures used in his Plates, supplied by the *Nicholsons*, are not, in fact, piratical copies of the Plaintiff's Work. The Defendant does not deny (what could not be denied) that if the *Nicholsons*, whom he employed, piratically copied these Figures from the Plaintiff's Works, that he is bound by their acts, as the acts of his Agents, and that Piracy in the *Nicholsons* is Piracy in him.

As to those Figures in which he admits resemblance, he says there is not one of them which was not given to the Public in some or many Works prior to *The Architectural Dictionary*; that some of these prior Works were the Works of *Nicholson* himself, as the articles of Architecture in *Rees's Cyclopaedia*, and the same articles in *Brewster's Encyclopedia*, and *The Carpenter's Guide*, published in 1792. And he says further, that not only were these Figures extant prior to *The Architectural Dictionary*, but that the *Nicholsons* had not in fact recourse to *The Architectural Dictionary* for them, nor to any materials collected for *The Architectural Dictionary*. Upon reference to the prior Publications, it is proved to be indisputably true that there is not one of these Figures which had not been given to the world

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prior to *The Architectural Dictionary*; and, the matter not being new, the Author of *The Architectural Dictionary* could acquire no Property in these Figures except by a new arrangement; but there is clearly no novelty in his arrangement. The Figures of *The Architectural Dictionary* are introduced to illustrate the Letter-press; and so are all Figures in prior Works, as well as in *The Practical Builder*.

If therefore the Figures furnished by *Nicholson* for *The Practical Builder* had in fact been copied from *The Architectural Dictionary*, this would have been no piracy, because the Author of *The Architectural Dictionary* had no Property in these Figures. But the *Nicholsons*, both Father and Son, positively swear that these Figures were not copied from *The Architectural Dictionary*, nor from any materials collected for *The Architectural Dictionary*.

With respect to the Letter-press, the Affidavits filed by the Plaintiff do not point out particular instances of invasion; but upon the Motion, I was referred to the article *Roofs*, which is nearly a verbatim copy of the same article in *The Architectural Dictionary*. The Defendant's Answer here is the same as to the Figures. This article was published verbatim in the Encyclopedia prior to *The Architectural Dictionary*, and is not therefore the Property of the Plaintiff.

Let the Injunction be dissolved against *Kelly*; but the Plaintiff being desirous to try this Case at Law, and undertaking immediately to bring an Action against *Kelly*, let *Kelly* in the mean time keep an Account of the Copies sold by him.

CASES IN CHANCERY.

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The following are the Orders which were made by the
Vice-Chancellor :

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“ This Court doth Order, that the Defendants, *Peter Nicholson* and *Thomas Kelly*, be respectively restrained by the Injunction of this Court from further writing, printing, publishing and selling, or exposing to sale by themselves, or their agents or servants, the Work or Publication called *The Practical Builder*, in the Bill mentioned, or any number or parts thereof, or any other Book or Publication which may prove prejudicial or detrimental to the sale of the Plaintiff's Work, called *The Architectural Dictionary*, and also from impeding in any manner, directly or indirectly, the circulation or publication thereof, until the said Defendants shall fully answer the Plaintiff's Bill, or this Court make other Order to the contrary.”

21st Nov. 1823.

Reg. Lib. A. 1823, f. 378.

“ This Court doth Order, that the Injunction granted in this Cause, as against the Defendant, *Thomas Kelly*, be dissolved, the said Defendant by his Counsel undertaking to keep an account of the Profits to arise by the sale of the said Book, called *The Practical Builder*, until the trial of any Action at Law which the Plaintiff may be advised to bring touching the matters in question in this Cause.”

20th Feb. 1824.

Reg. Lib. A. 1823, f. 699.

The Plaintiff appealed to the *Lord Chancellor* against this last Order. The Case was argued for several days, and his Lordship ultimately pronounced the following Order :

“ His Lordship doth Order, that an Injunction be
awarded to restrain the Defendant, *Thomas Kelly*, from

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publishing or selling, in the name of *Peter Nicholson*, the Book or Work in the Pleadings mentioned, called *The Practical Builder* or any parts or part, or numbers or number thereof; and also from employing the Defendant, *Peter Nicholson*, from [in] writing any part of the Letter-press, or designing any of the Plates of the said Book or Work, called *The Practical Builder*, and that the Defendant, *Thomas Kelly*, be also restrained from publishing or selling, in the name of *Peter Nicholson*, any part of the said Book or Work, called *The Practical Builder*, printed or engraved since the filing of the Plaintiff's Bill in this Cause, which has been written or designed by the Defendant, *Peter Nicholson*, until the hearing of this Cause, or until the farther Order of the Court."

Reg. Lib. A. 1823, f. 1921.

BURR v. MASON.

1824.
17th January.

THE Bill was filed under the 36th Geo. 3. c. 90, s. 1, to have a sum of Stock standing in the names of two Trustees, (one of whom was out of the jurisdiction of the Court,) transferred by the other Trustee to the Plaintiffs. After the Answer had been put in, but before the Cause was heard, a Petition was presented by the Plaintiffs, praying to the same effect as the Bill. That Petition now came on to be heard.

*Transfer of
Stock.*

Where a Bill is filed merely to obtain a Transfer of Stock, standing in the name of a Trustee who is out of the jurisdiction of the Court, the Order must be made at the hearing of the Cause, and cannot be obtained by Petition.

Mr. K. Parker, in support of it, cited *Williams v. Bird (a)*.

The Vice-Chancellor said, that he could not make the Decree in the Cause upon a Petition, but that the Cause must be regularly set down for hearing.

(a) 1 V. & B. 3.

1824.
17th January,
1st and 12th
March.

TAYLOR v. SHAW.

*Practice
Pleading.*

After Plea allowed to part of the Bill, the Plaintiff cannot amend his Bill without a special Order, to be obtained on Notice of Motion, stating the proposed Amendments.

THE Plaintiff and the Defendant had entered into Partnership in 1812, as Army Clothiers, and carried on Business as Partners for several years. The Bill prayed that it might be declared that the Partnership was dissolved, and that the Accounts might be taken from the commencement of the Partnership.

To this Bill the Defendant pleaded a settled Account up to the 31st of December 1813, and answered the rest of the Bill.

The Plea upon Argument was allowed.

After Plea of settled Account allowed to part of the Bill, Motion to amend the Bill, by stating facts which tended to show that there was no settled Account, or that the Plaintiff ought to be allowed to surcharge and falsify, was refused with Costs; because the Plaintiff could prove there was no settled Account by taking issue on the Plea, and might have amended with a view to surcharge and falsify before the Plea was argued.

The Plaintiff, after the Plea was allowed, endeavoured to obtain an Order to amend his Bill upon a Motion of course; but the *Registrar* refused to draw up the Order on a Motion without Notice, as being contrary to the Practice of the Court (a).

The Plaintiff then moved, upon a general Notice, that he might have leave to amend his Bill. The Motion was supported by an Affidavit of the Plaintiff, stating that the settled Account was erroneous in various particulars; and generally that he could introduce divers charges whereby he could falsify and displace the alleged stated Account.

1st March.—THE Motion having come on upon this Notice, the *Vice-Chancellor* required that the Plaintiff should serve a new Notice of Motion, in which he should

(a) See *Carleton v. L'Estrange*, 1 Turner, 23.

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state the particulars of the Amendments which he proposed to introduce into the Bill.

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A Notice of Motion was accordingly served, stating the particulars of the proposed Amendments. These were, in substance, facts tending to show that the Account pleaded was not to be taken as a settled Account; that the Defendant had deceived the Plaintiff, and that there were divers errors and omissions in the items of the pleaded Account, which the Plaintiff sought to surcharge and falsify.

The Defendant filed an Affidavit, which in substance denied the errors and the facts sought to be stated by the Plaintiff.

Mr. *Rose*, for the Motion.

12th March.

Mr. *Horne*, and Mr. *Keene*, for the Defendant, *contra*.

The VICE-CHANCELLOR :—

The first question that occurred in this Case was, whether, after a Plea allowed to a part of the Bill only, the Plaintiff could obtain the common Order to amend, as of course, on the ground that, as to the part of the Bill not covered by the Plea, the Plaintiff was now in the same situation as if his Bill had originally extended to that part alone, and was therefore entitled to amend, as of course.

It appears, however, not to be the practice to permit the Plaintiff to obtain, in such a Case, an order to amend, as of course; and the reason obviously is that, under a general Order to amend, the Plaintiff might make a new Case, which would altogether avoid the Plea, and leave the Defendant no benefit or protection

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from it. The Plaintiff has therefore been required to state, in his Notice of Motion, the particulars of the Amendments which he desires to make. These proposed Amendments may accurately be described as being in their nature either Amendments introducing matter to show that in fact the Plea is not true, and that there was no settled Account up to the 31st December 1813; or Amendments to show that if the Plea be true, and if there was a settled Account up to the 31st of December 1813, the Plaintiff ought to be permitted to surcharge and falsify that Account.

If the Plaintiff means to disprove the Plea, he must go to issue upon it; and it would be useless to permit him to introduce new matter tending to that effect in his Bill; because the Plea protects the Defendant from answering it; and, if the Plaintiff means now to admit the truth of the Plea, and to make a new Case which should avoid its effect and be consistent with it, he comes too late for that purpose.

If the Plaintiff had thought fit thus to change the nature of his Case before the Argument of the Plea, he was at full liberty to do so, upon payment of twenty Shillings Costs; but having made his election to rest his Case upon the invalidity of the Plea, it would be unjust to the Defendant to permit him now to shift his ground in the present Suit.

The application now made must therefore be dismissed, and, failing wholly, must be dismissed with Costs.

MARQUESS OF ORMOND v. KYNERSLEY.

1824.
20th February,
20th March.

THE Bill in this Case was filed by Lord Ormond against the Executors of *Clement Kynnersley*, who had been Tenant for Life, unimpeachable of Waste, of the Estates in question, in order to charge his personal Estate with the value of ornamental Timber alleged to have been cut by him.

Award.

The Court will enforce an Award made under an Order of Reference, by consent, in a Cause; and it makes no difference that it is a part of the Order that the Parties should execute Arbitration Bonds.

By the Decree made at the hearing of the Cause, it was referred to the *Master* to take an Account of the ornamental Timber so cut, and it was directed that the Value should be paid out of Mr. *Kynnersley's* personal Estate; and Costs and further Directions were reserved.

After the Decree, Lord Ormond died, and the Suit was revived by his Executors, and an Order by consent was made upon the Petition of those Executors, that the *Master*, instead of proceeding under the Decree, should approve of a proper person or persons to be an Arbitrator or Arbitrators of the matters in difference in the Cause, as also of all other matters of difference between the Parties; and the *Master* was to settle and approve of proper Bonds to be entered into by the Parties for that purpose.

It is not necessary to make such an Award a Rule of Court.

The *Master* did accordingly approve of an Arbitrator, and settle Arbitration Bonds, which were executed by all Parties. By these Bonds the Arbitrator was to make his Award on or before the 1st of February 1823; but on the 3d of February 1823, an Order was made by consent, on the Petition of the Defendant, the Executor of *Clement Kynnersley*, that the time for making the Award should be extended to the 1st of July 1823; and by

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another Order by consent, on the 13th of June 1823, the time was further extended to the 28th of November 1823; such last-mentioned Order being also made upon the Petition of the Defendant, the Executor of *Clement Kynnersley*. The Arbitrator having awarded that a certain sum should be paid, at a time stated, by the Defendant to the Plaintiffs, a Motion was now made on the part of the Plaintiffs, that the Award if necessary might be made a Rule of Court, or, if not necessary, then that the Defendant might be ordered to pay the sum awarded.

Sir *G. F. Hampson*, for the Motion.

Mr. *Pepys*, for the Defendant, opposed the Motion.

The *Register* (Mr. *Walker*) being consulted by the Court as to the necessity of having the Award made a Rule of Court, seemed to consider that it ought to be so, as the Court would not otherwise have any record of it.

The Motion was ordered to stand over, that search might be made for Authorities.

20th March.

Sir *G. F. Hampson*, on this day stated that there was one Case in which the Court had enforced an Award made on an Order taken by consent for a Reference, without the Award being made a Rule of Court. *Sibley v. Saffel*, 18th of March 1812, and 7th of March 1814, before Lord *Eldon*. He also mentioned *Hide v. Petit* (a).

Mr. *Pepys* objected that the Court would not enforce this Award, because it being a part of the Order of Reference that the Parties should execute Arbitration

(a) 2 Freem. 133.

Bonds, it was plainly their intention to rely upon the Bonds as their security for the performance of the Award, and that they had therefore excluded the jurisdiction of the Court to enforce the Award.

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The Case stood over for judgment.

The VICE-CHANCELLOR:—

As to the first point, the Case of *Sibley v. Saffell* is an express Authority that the Court will enforce an Award made by virtue of an Order of the Court, without requiring that the Award should first be made a Rule of the Court. In the case of a Reference under the Statute, it is not the Award, but the Submission which is made a Rule of Court. It is not denied that, generally speaking, this Court will enforce an Award which is the result of an Order of Reference made by the Court. But it is said, for the Defendant, that such Orders, being matters of Agreement and Consent, the Parties may agree, if they think fit, to exclude the jurisdiction of the Court; and that here there is plain evidence of such agreement by the condition to execute Arbitration Bonds, which would be wholly unnecessary if the Parties relied upon the authority of the Court. There is a circumstance here, to which I shall presently refer, which does not make it necessary for the Court to determine this point; but it does appear to me extremely difficult to maintain that the additional security of Arbitration Bonds, which will reach the Property of the Parties, necessarily implies an agreement to exclude the jurisdiction of the Court, which primarily gives only a personal remedy. There the time limited in the Arbitration Bonds for making the Award was the 1st of February 1823, and there was no provision in the Bond for the Arbitrator to enlarge the

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me; and, the time being suffered to expire without an Award, the Bonds became *functi officio*. On the 3d of February 1823, the Defendant, by petition and consent, obtains an Order of this Court to enlarge the time for making the Award to the 1st of July 1823; and, afterwards, another Order, by like petition and consent, for a further enlargement of the time to the 28th of November 1823, and the Award which bears date on the 10th day of November 1823, is therefore to be considered as made by the sole authority of the Court, and not by the force of the Bonds. Take the Order, therefore, for payment according to the Award.

26th February.

BALDWIN v. LAWRENCE.

Partnership.
 Parties.

Bill by three of the Partners in a numerous Trading Company claiming certain Privileges under the Articles of Copartnership, against the Members of the Committee for managing the Commercial Concerns of the Company, dismissed, because it was not filed by the Plaintiffs on behalf of themselves and the other Partners not Members of the Committee.

IN 1804, several persons residing in and near Birmingham agreed to form a Company or Copartnership for the purpose of supplying themselves with Copper. For effectuating this purpose, they executed certain Articles of Partnership, dated the 1st of February, by which, after reciting that the article of Copper had become of increasing importance to the town of Birmingham, and having opened to it fresh sources of Trade and Manufacture unknown prior to the establishment of any Copper Smelting Company there, and the increased demand for the article having rendered the supply to the Trade of the Town both irregular and precarious, insomuch that it had of late been subjected to great disappointment, injury and loss, and the Parties thereto being desirous of removing, as far as in their power, all such inconveniences, and of contributing

towards a due and regular supply of Copper to the Town of *Birmingham* and its Neighbourhood, and of promoting and extending their general Trade and consequent Prosperity, each of the Persons whose Names were thereunder written and Seals affixed mutually covenanted with the others, that the Parties thereto should be Copartners in the Trade and Business of purchasing Copper, and other Metals and Ores, and of smelting the same; and have power to manufacture the Metals so bought or smelted into such forms and states as might be found best adapted to the trade, interest and advantage of the Copartnership; and that the Trade should commence from the 17th of October then last, and be carried on under the firm of The Crown Copper Company; and upon a Capital or Joint Stock not exceeding 100,000 *l.* and that the same should be divided into one thousand Shares, of 100*l.* each; and that no Partner should hold more than Twenty such Shares, unless the same should come to him by Marriage, Marriage-Settlement, Bequest or Succession: and also that proper Buildings, Works and Conveniences should be bought or erected, and the Joint Trade carried on in such places as the Committee for the time being, to be appointed as was thereafter mentioned, should deem proper; and also that the Committee should have power to purchase, rent or contract for any Lands containing Coals, or for the erecting Works, Engines, Mills and other Buildings, or for the making of Wharfs or Quays, or to purchase, rent or contract for any Coal-mines or Ores; and to convey, assign and set over such Lands, and dispose of the Coals, Minerals or Ores to be obtained therefrom, in such manner as should appear to the Committee most likely to conduce to the benefit of the Copartnership; and also to provide such Vessels

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as might be deemed necessary for the use of the Copartnership; and to export Coals or other Commodities, and to import Ores, Minerals or other Commodities, in such Ships or Vessels as from time to time should be deemed necessary for the benefit of the Copartnership; and also that each of the Parties, for each Share he should possess in the Joint Trade, should, every year during the Copartnership, take from the Copartnership, at the current Price and time of Credit to be affixed by the Committee, so much Copper, not exceeding one Ton, or of other Metals, the Amount whereof should not exceed the Value of One Ton of Copper at that time, as the Committee for the time being should deem proper; and that, for the managing the Partnership Concerns, a Committee of Twenty-one of the Parties thereto, (no one of them having less than Four Shares) should be chosen by the Parties at large in manner therein mentioned; and that any Five Committeemen, when regularly met, should be competent to act as a Committee, and that the major part of the Committee for the time being assembled should have power to bind the whole, and that the Committee should appoint and remove the Clerks, Agents and Servants of the Copartnership, (except the Treasurer and Banker) and manage the concerns of the Copartnership, and have the entire power of buying in and selling out all the articles in which the Partnership should deal, and should see that due entries were made by the Clerks in the Partnership Books, of all their Receipts and Payments, and Dealings and Transactions on account of the Copartnership; and that the Committee should meet once a month at the least, when the Treasurer should produce all Accounts relative to the Concern for the inspection of the Committee, who should

at the same time examine the Clerk's Books and Accounts; and that a person appointed by the Committee should sign them; and that it should be lawful for the Committee to borrow upon the credit of the Joint Trade any sum not exceeding 40 *l.* on each Share, whenever it should appear to them that such Monies could be employed by them in doing the acts which they were thereby authorized to do for the benefit of the Copartnership; and that each of the Parties should pay his share of such sums of Money not exceeding 100 *l.* for the whole upon each Share he should hold in the joint Trade; and that, when Calls should have been made to the amount of 40 *l.* on each Share in the Copartnership, or Money should have been borrowed to that amount by the Committee, the Committee for the time being should call a General Meeting of the Partners, when the whole state of the affairs belonging to the Copartnership should be laid before the Meeting; and, if any of the Parties thereto should wish to decline having any further concern in the joint Trade, it should be lawful for him, within one month after such Meeting, to withdraw his Name therefrom, on executing a release of his or her Share therein, and paying a proportionate share of the Debt or Debts contracted by the Copartnership, which the Cash in hand and Effects belonging to the Copartnership, should not be sufficient to pay; and also that, on or before the last Wednesday in June in every year, or oftener, if the Committee should see fitting and necessary, or one-fourth in value of the Holders of Shares in the Copartnership should desire it, a General Meeting of the Partners should be held, and the state of the affairs of the Partnership should be laid before them by the Committee, and the sense or opinion of the General Meeting should be taken upon the same, and the Resolutions and Determinations of the major part of them thereupon should be final and conclusive;

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and that, at such General Meetings, the Accounts of the Partnership should be laid before them for their examination and allowance; and that, at such Meetings, it should be determined what Dividends should be made upon the Profits of the joint Stock and Trade; and that all Bills, Notes, Cheques and Receipts on behalf of the Partnership, should be drawn and signed by the Treasurer of the Partnership; but if no Treasurer should be appointed, then by three or more of the Committee; and that no individual, merely as a Partner, without an appointment in pursuance of the Deed, should intermeddle with the Cash or Effects of the Partnership; and that no Partner should sell any Share or Interest in the joint Trade to any person, unless the person to whom the same should be sold should enter into such Covenants with the Partners for the time being in the joint Trade, or their Committee, for the performance of all the covenants, clauses and things therein contained, and every alteration and addition then made or to be made therein or thereto, by virtue of the power therein contained, in the same manner as the person selling the same ought to do or have done, and as the person to whom the same should be so sold ought to have done in case he had originally been a Partner in the joint Trade, and had executed the Articles, as, by the Partners for the time being, or their Committee, should be lawfully required; and that, in case of the death or insolvency of any of the Partners, his legal Representative or Assignee should be considered a Partner in the joint Trade, and should hold and dispose of the Share of such person, subject to the terms, covenants and conditions of the Articles; and also that it should be lawful for three parts in four of the whole Partners in value in the joint Trade, at any Public Meeting, to dissolve the joint Trade or Copartnership; and also that, if at any time

during the continuance of the Copartnership, any question should arise between any of the Partners and the rest of the Company collectively concerning the joint Concern or any thing therein contained, the same should be referred to two indifferent persons, one to be elected by the Committee, and the other by the Party with whom such question should arise, within one month after the same should so arise; and, in case such two persons could not agree within one month after such reference, then the same should be determined by an indifferent person, to be chosen by the two first Referees, who should determine the same within twenty days next after he should be appointed; and whatever order, award or determination the said Referees, or the Umpire, should make, each of the Parties covenanted to perform and keep without any further suit or trouble whatsoever.

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The Bill was filed by three of the Partners against the Members of the Committee; and, after setting forth some of the provisions of the Articles of Copartnership, it stated that the number of the other Partners was very large, but what was their Number, or who they were by Name, the Plaintiffs were unable to state, because the Articles of Copartnership were in the possession of the Defendants, who refused to permit them to have access thereto: that no Treasurer had ever been appointed to the Company, and that there was no Person or Officer appointed by the Articles to sue or be sued in respect of the concerns of the Company: that the Defendants represented the Copartnership, and were competent to protect its rights and interests. The Bill prayed, that the Plaintiffs might be declared to be entitled to the inspection, at all seasonable times, of all the Deeds, Books, Accounts, Writings and Documents belonging to the Company; and that they might be permitted to

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inspect the same at all seasonable times, and to take Extracts therefrom.

The Defendants, by their Answer, admitted that the Articles were in their possession ; that no Treasurer had ever been appointed ; and that there was not any Person or Officer appointed by the Articles to sue or be sued in respect of the Concerns of the Company ; and that the Company consisted of one hundred and ten persons : they said that they had been induced to believe that the Plaintiffs and the other Partners, who were not Members of the Committee, were entitled, at the times when General Meetings of the Partners were held, and at no other times, to have access to and the inspection of such state only of the Partnership affairs, and the Accounts and Documents of the Partnership, which by the Articles were directed to be laid before the Partners at their General Meetings : and that they had refused the Plaintiffs access to those Books for the purpose that the Committee might not be impeded in managing the Copartnership concerns by the interruption of a numerous body of individual Proprietors using such access ; and also for the purpose of preventing improper disclosures to other Establishments of the like description, or to Traders in or Manufacturers of the like Wares as those used or manufactured by the Company, of the confidential affairs of the Concern, to its prejudice ; and that the Committee were the more induced to do so, because the Plaintiffs were, at the time of their application to inspect the Books and Papers of the Concern, large Proprietors in the Rose Copper Company, which was formed for carrying on the like business, and for the like purposes as the Crown Copper Company, and a rival to the same : that, if they were required by the Order of the Court to permit the Plaintiffs to inspect the Deeds,

Books, Papers and Writings belonging to the Copartnership, they might, when so required, have ceased to be upon the Committee, and to have the custody of those Documents, and, consequently, be unable to obey that Order; wherefore they submitted that all the Partners ought to have been made Parties to the Suit, and they claimed the same benefit of that objection as if they had taken it by way of Demurrer or Plea; and they then mentioned the Names of the other Partners, to enable the Plaintiffs to make them Parties to the Suit.

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Mr. Hart, and Mr. Farrer, for the Plaintiffs:—

The power assumed by these Defendants of preventing the Partners from inspecting the Partnership Accounts, is unreasonable and inconsistent with several of the provisions of the Articles of Copartnership: for, suppose a Partner has it in contemplation to avail himself of the privilege given him by these Articles of withdrawing from the Partnership, is he to rely implicitly upon the account which the Committee may choose to give him, and, without further information on the subject, to decide whether he will continue in the Trade, or give up all that he has embarked in it? Is a Partner to be prevented from knowing how many Bills of Exchange have been signed by the Committee, to which he is liable? The Clause which enables a Partner to sell his Share, can never be acted upon, if he is to be kept in that state of ignorance which this Committee contend for: for who will enter into any contract for the purchase of the Share when he can obtain no information as to the subject of the purchase? There is not a word in the Articles from which it can be inferred that it was intended that the Partnership Accounts should be kept by the Committee. If they were to be entrusted to any person, it was to the Treasurer. The Committee are invested with

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powers inconsistent with the keeping of the Accounts; and it was clearly the intention of the Parties to these Articles, to keep the transacting of the business of the Partnership separate from the keeping of the Accounts.

Mr. *Heald*, and Mr. *Gardner*, for the Defendants.

The Court will not bind all the Partners in a trading Company, as to the construction of the Articles of Partnership, upon a point of general interest, in a Suit by some of the Partners against a Committee for the Management of the Commercial Concerns, not otherwise authorized to represent the Partnership.

The *Vice-Chancellor* intimated an opinion, that the Plaintiffs, according to the true construction of the Partnership Articles, were not entitled to the relief prayed. But he held that the Court could not bind all the Partners as to the construction of the Articles, upon a point of general interest, in a Suit in which Three only of the Partners were Plaintiffs, and the Committee for management of the Commercial Concerns, who were not authorized otherwise to represent the Partnership, were the only Defendants: and he dismissed the Bill. He said that the question would have been different if the Plaintiffs had filed this Bill on behalf of themselves and all other the Shareholders, not Members of the Committee, praying for the inspection of Books in the custody or power of the Committee.

He distinguished this Case from that of an individual not being a Partner, but claiming against a numerous Partnership or Club, and who might file a Bill against a few of the Partners or Members only (a).

(a) *Cockburn v. Thompson*, 16 Ves. 321; *Meux v. Maltby*, 2 Swanst. 277; *Weale v. West Middlesex Waterworks Company*, 1 J. & W. 358; and *Weld v. Bonham*, post.

ROWLINSON v. HALLIFAX. (a)

1824.
March 1st.

Conduct of a
Suit.

THE object of this Suit was to recover part of the Estate of *William Hyde*, deceased, which, under his Will, had become vested in his Sister, *Jane Hyde*, also deceased, who, by her Will, gave all her Property to *Sarah Rowlinson*, and appointed *Daniel Rowlinson* her Executor. The Bill was filed by the Plaintiff, *John Rowlinson*, alone, stating himself to be Executor of *Daniel Rowlinson*, and consequently the personal Representative of *Jane Hyde*: but, on the hearing, it appeared that the Will of *Jane Hyde* had not been proved in the proper Ecclesiastical Court, and the Cause was ordered to stand over. Letters of Administration of the Estate of *Jane Hyde* were afterwards granted to *Sarah Rowlinson*, and the Bill was amended by joining her as a Co-plaintiff. The Cause continued to be conducted by the Solicitors of *John Rowlinson*, and a Decree for an account and inquiries was made.

The conduct of the Cause given, on Motion, to one of two Co-plaintiffs, on its appearing that the other had no interest in the matters in question.

Mr. *Horne*, and Mr. *Jacob*, on the part of the Plaintiff, *Sarah Rowlinson*, now moved that the Solicitors might deliver to her the Papers in the Cause, and that she might be at liberty to prosecute the Suit.

Mr. *Spence* on the other side.

The *Vice-Chancellor* observed, that if he had been

(a) *Ex relatione* Mr. *Jacob*.

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aware, at the time when the Cause was first heard, that *John Rowlinson* had no interest in the matters in question, he should have dismissed the Bill, instead of allowing it to be amended; and he made the Order as prayed, upon the Plaintiff, *Sarah Rowlinson*, paying to the Solicitors the Costs due to them, as between Solicitor and Client.

Reg. Lib. 1823, B. f. 639.

“This Court doth Order, that the Plaintiff, *Sarah Rowlinson*, be at liberty to carry on and prosecute this Suit;” the Order then directs the Costs of the Solicitors, who had acted for the Plaintiff *J. Rowlinson* to be taxed, and upon payment, that they should deliver up, on oath, to *Sarah Rowlinson*, all Papers relating to the Cause; and it reserves the question of the Costs of the Motion, as between the Plaintiffs, *Sarah Rowlinson* and *John Rowlinson*.

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1824.
19th March.

Specific Performance.

ON the 9th September 1819 the Plaintiff agreed to let to the Defendant a House and Garden, for seven fourteen or twenty-one years, at the option of the latter, for a Premium of Fifty Guineas, and an annual Rent of Eighty Guineas; to make certain alterations and improvements in the House and Garden at his own expense; to procure permission, from the Ground-Landlord, for the Defendant to build a Coach-house and Stable on the Premises; and to complete the alterations and improvements, and deliver Possession to the Defendants, on or before the 29th of that month.

Bill by a Lessee, for the Specific Performance of an Agreement for a Lease, dismissed, because it was not filed until more than two years after the Defendant had given Notice to the Plaintiff of his intention not to perform the Contract, on account of the latter not having fulfilled it on his part.

The alterations and improvements not being finished, nor the permission obtained, by the time agreed upon, the Defendant, on the 8th of October 1819, informed the Plaintiff, by Letter, that, if the alterations and improvements were not completed by the 14th of that month, he should give up all idea of taking the House, and look out for one elsewhere. And the Plaintiff having informed the Defendant that the Lease was at his House ready for signature, and requested the Defendant to name a time for executing it, the latter refused to execute it until the Agreement had been fulfilled on the Plaintiff's part.

The Bill was filed on the 1st of September 1821. The Defendant, in his Answer, said that, since he had refused to execute the Lease as before mentioned, a period of nearly two years had elapsed, during all which

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time the Plaintiff had retained possession of the House, and had acted as Owner of it. And he submitted that the Plaintiff had abandoned the Agreement and acquiesced in the Defendant's refusal.

By the Decree, the *Master* was directed to inquire and state whether any thing, and what, had passed between the Parties, or any person on their behalf, relating to the subject of the Agreement, after the Letter of the 8th of October 1819.

It appeared by the *Master's* Report, that nothing passed between the Parties, relating to the matter in question, after the 9th of November 1819, until the 17th of August 1821, when the Plaintiff's Solicitor wrote to the Defendant's Solicitor, requesting to know whether the latter would appear to the Bill.

The Cause now came on for further directions.

Mr. *Sugden*, and Mr. *Treslove*, for the Plaintiff.

Mr. *Heald*, and Mr. *Sidebottom*, for the Defendant.

The VICE-CHANCELLOR :—

As this Bill was not filed for more than two years after the Treaty had been broken off and the Defendant had refused to perform the Contract, and as the only reason assigned for the delay is, that the Plaintiff's Attorney had mislaid the Papers relating to the Transaction, I shall dismiss the Bill, but without Costs.

FITCH v. CHAPMAN.

THIS was a Bill of Foreclosure against a Husband and his Wife.

The Defendants put in a Plea of Usury, and intituled it as a joint and several Plea. The Plea now came on to be argued.

Mr. *Horne*, and Mr. *Turner*, for the Bill, insisted that the Plea was irregular on account of its Title: because, as the Wife joined with the Husband in the Plea, it could not in any sense be considered as a several Plea.

Mr. *Wray*, for the Plea.

The *Vice-Chancellor* considered the term "several" as meaning nothing; and that, being mere Surplusage, it did not vitiate the Plea.

1824.
28th April.

Pleading.

Plea by Husband and Wife, intituled as a joint and several Plea; held, that the word "several" was mere Surplusage, and did not vitiate the Plea.

1824.
28th April.

Pension.

The Purchaser of a Pension granted by his late Majesty, during pleasure, is not entitled to a Pension granted by the present King, to the same Person and of the same Amount, under a new Warrant reciting the Grant made by his late Majesty which had ceased by the Demise of the Crown, though the Motive for granting both Pensions was the same.

CLAY v. ST. JOHN.

THE Plaintiff filed this Bill to obtain payment of a Pension granted by His present Majesty to the Defendant, in continuation of a previous Pension of the same amount granted to him by the late King, and purchased by the Plaintiff in the year 1808.

The Bill set forth a Warrant of the late King, under his Royal Sign Manual, dated the 12th of August 1780, by which his late Majesty declared his Royal Will and Pleasure to be, and, thereby directed that an Annual Pension of 131*l.* should be paid by the Commissioners of the Treasury unto the Honourable *Mary St. John*, the Widow of *Henry St. John*, a Captain in His Majesty's Navy, to commence from the 5th of April 1780, and to continue payable during His Majesty's pleasure; and, in case of her decease, to be in like manner paid to *Henry St. John*, (the Defendant,) the Son of Captain *St. John*.

In 1783, Mrs. *St. John* died. In March 1807, a Commission of Bankrupt was awarded against the Defendant, *Henry St. John*. The Assignees under that Commission caused this Pension to be put up for Sale by Public Auction, and described it in the Particulars of Sale as "a Pension from Government during the life of *Henry St. John*, (the Defendant,) then aged thirty-eight." The Plaintiff became the Purchaser at that Sale for the sum of 380*l.* An Assignment was thereupon executed by the Defendant, *St. John*, as well as by the Assignees, whereby the Pension of 131*l.* so granted by his late Majesty, and all Arrears and growing Payments thereof, and all Powers and Authorities for recovering the same,

and all Right, Title, Interest, &c. of the Defendant *St. John*, and his Assignees, to the Pension of 131 *l.* so granted, were assigned to the Plaintiff, his Executors, Administrators and Assigns. The Deed contained a Covenant by the Defendant *St. John*, and his Assignees, in the usual, terms for the better assigning and assuring the Premises to the Plaintiff, his Executors, Administrators and Assigns, “ and for more effectually enabling him or them to recover and receive the said Annual Pension or Sum.”

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The Defendant *St. John*, some time before the demise of his late Majesty, obtained his Certificate under the Commission of Bankrupt; and the Plaintiff, up to the demise of his late Majesty, duly received the Pension under the Assignment.

On the 1st of July 1820, His present Majesty granted a Warrant under his Sign Manual, in the following Terms :

“ *George, R.*—Whereas Our late Royal Father, of happy and glorious Memory, was graciously pleased to authorize and direct the late Paymaster of Pensions to pay unto *Henry St. John*, during his Royal pleasure, an Annuity or yearly Pension of 131 *l.* and which said Annuity was, in pursuance of an Act passed in the twenty-second year of his late Majesty’s Reign, transferred to Our Exchequer, and payable out of his Civil List Revenues; and whereas the said Annuity or yearly Pension hath ceased by reason of the demise of Our ~~said~~ late Royal Father, and We are graciously pleased to give and grant unto the said *Henry St. John* an Annuity or yearly Pension to the like Amount, Our will and pleasure is, that, by virtue of Our general Letters of Privy Seal bearing date the 2d day of February 1820, you do issue

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and pay, or cause to be issued and paid, out of any Our Treasure or Revenue in the Receipt of the Exchequer applicable to the uses of Our Civil Government, unto the said *Henry St. John*, or to his Assigns, the said Annuity or yearly Pension of 131*l.* without account, to commence from the 29th day of January 1820, the day of Our Accession, and to be computed, payable and paid, by the day, from such day of commencement thereof, to and for the 5th day of April 1820, and from thenceforth to be paid quarterly or otherwise, as the same shall become due, and to continue during Our pleasure: And for so doing this shall be your Warrant. Given at Our Court at Carlton House, this 1st day of July 1820, in the First Year of Our Reign.

By His Majesty's Command,

N. Vansittart,

G. C. H. Somerset,

E. A. M'Naghton.

To the Commissioners of Our Treasury."

The Officers of the Exchequer refused to pay the Pension to the Plaintiff under this new Warrant, unless he received from the Defendant *St. John* a Power of Attorney, or other proper Authority; and would not recognize the Assignment of 1808 as a sufficient Authority for Payment to the Plaintiff under the new Warrant.

After stating these facts, and also that an Agent of the Defendant *St. John*, (who was made a Co-defendant in this Suit,) had, under an Authority from *St. John*, who was residing abroad, received the Pension under the new Warrant and threatened to remit it to *St. John*, the Bill charged that the Pension under the new Warrant was not a new Pension, or different or distinct from the Pension

granted by his late Majesty, but a continuance thereof, and that the last Warrant proceeded and was grounded upon, and had reference to, the Grant and Warrant of his late Majesty, and, but for the same, would not have been granted or issued; and that it has always been customary, in point of form, on a demise of the Crown, to issue fresh Warrants under the Royal Sign Manual for the continuance and future payment of all Pensions subsisting at the time of such demise; and that the fact of the last Warrant making the Pension payable to the Defendant *St. John* and his Assigns, although the Grant and Warrant of the late King made it payable to the Defendant *St. John* alone, was evidence of the Plaintiff's Title.

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The Bill prayed that it might be declared that the Pension under the Warrant from His present Majesty was a continuance of the former Pension, and that the Plaintiff might be declared entitled to it as a Purchaser; that the Defendant *St. John* might be decreed specifically to perform his Covenants contained in the Indenture of Assignment, and to execute a proper Instrument to entitle the Plaintiff to receive all Arrears and future Payments of the Pension from the Accession of His present Majesty, and for an Account of the Payments received by either of the Defendants, and for an Injunction to restrain them from receiving any future Payments.

To this Bill the Defendants put in a general Demurrer for want of Equity.

The Demurrer now came on to be argued.

Mr. *Knight*, for the Bill.

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Mr. *Horne*, and Mr. *Palmer*, for the Demurrer, insisted, that the circumstance of both the Pensions being granted only during the Royal Pleasure, was decisive against the Plaintiff's claim.

The VICE-CHANCELLOR :—

The Plaintiff is the Purchaser of the Pension granted by the late King during his Majesty's pleasure. This Pension necessarily determined by the Demise of the late King. The same motive of Bounty which induced the Grant from the late King to the Defendant has probably influenced the Grant of His present Majesty: but it is not for that reason the same Pension. A Person entitled to a Pension during pleasure may, if he pleases, sell, not only that Pension, but any future Pension granted in consideration of the same motive: but that is not the Case here. This Case is improperly confounded in principle with Cases where a Testator gives a Leasehold Interest to two or more persons successively. There all Interest in the subject which the first Taker acquires in consequence of the Testator's Gift, enures for the benefit of those in remainder. A Purchaser of a Pension is not a Remainder-man.

Demurrer allowed.

STANHOPE v. KEIR.

THIS was a Bill filed by Parties claiming to be entitled, under the Limitations in a Marriage Settlement, to real and personal Estate, in default of Appointment.

1824.
29th April.

Appointment.

Eugenia Stanhope, by the Settlement on her Marriage with the Defendant *John Keir*, conveyed her real Estates to the use of the Defendant *John Keir*, for his Life; with Remainder to the use of the Issue of the Marriage, as she should appoint; and, for default of such Issue, if she should survive the Defendant *John Keir*, to the use of herself in fee; but if she should die in his Lifetime: "To such Uses, upon and for such Trusts, Intents and Purposes, and with, under and subject to such Powers, Provisoos and Declarations, as the said *Eugenia Stanhope* should, notwithstanding her Coverture, by her last Will and Testament in writing, or any Codicil or Jodicils to the same, *signed and published by her in the presence of, and attested by three or more credible Witnesses*, appoint; and in default of such last-mentioned Appointment, and so far as any such Appointment shall not extend, to the use of *Charles Stanhope*, (one of the Plaintiffs,) his Heirs and Assigns for ever."

Where a Power was to be executed by a Will, signed and published in the presence of, and attested by three Witnesses; held that a Will concluding with this Declaration: "this is my last Will and Testament," and expressed to be signed by the Testatrix, in the presence of the three attesting Witnesses, was not a good Appointment, because the publication was not attested.

By the same Settlement, she covenanted to transfer several Sums of Stock in the Public Funds, into the Names of the Trustees, upon Trust to pay the Dividends to the Defendant *John Keir* for his Life, and, after his Decease, to pay the Dividends to her for her Life, and, after the Death of the Survivor, to stand possessed of the

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Stock in Trust for the Children of the Marriage, as she should appoint; and, in case no Child should become entitled under the Trusts before expressed: "In Trust for the said *Eugenia Stanhope*, (if she should survive the said *John Keir*,) her Executors, Administrators and Assigns; but, if she should die in his Lifetime, then in Trust for such Person or Persons, for such Intents and Purposes, and subject to such Powers, Provisoes and Declarations, as the said *Eugenia Stanhope*, by her last Will and Testament in writing, or any Codicil or Codicils thereto, to be signed and published by her in the presence of, and attested by two or more credible Witnesses, should, notwithstanding her Coverture, direct or appoint, give or bequeath the same;" and, for default thereof, in Trust, as to one Sum, for the Plaintiff *Charles Stanhope*, his Executors, Administrators and Assigns, and, as to the others in Trust for the person who should, at the death of *Eugenia Stanhope*, be the next of kin of her deceased Mother.

The Marriage took place soon after the date of the Settlement. There was issue of the Marriage only one Child, who lived only for six Months. On the 16th of May 1823, the Wife herself died, having, on the 19th of November 1818, a few days after the Marriage, made her Will in the following Words:

" *Gravesend*, November 19th, 1818.

" I, *Eugenia Keir*, formerly *Eugenia Stanhope*, hereby give and bequeath all that I do or shall possess in Landed Property and Funded Property, and my Books, China, Plate, Linen and Furniture, &c. to my Husband *John Keir*, Esquire, of the Island of *Madeira*, for ever, and also my Jewels, &c.; and this is my last Will and Testament, made and signed in the year of our Lord 1818, on the

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19th day of November, at *Gravesend*, in the County of
Kent. (signed) *Eugenia Keir*, (L. S.)

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In the presence of
C. Macdonald Lockhart.
Thomas Bennett.
Alexander Edwards."

This was the only Instrument executed by Mrs. *Keir*, in the nature of an Appointment under the Powers in the Settlement.

The Bill was filed against *John Keir* and the Trustees of the Settlement, praying to have it declared that the Plaintiffs were entitled to the settled Property, subject to the Life Estate of *John Keir*, upon the ground that the Will was not duly attested according to the Powers.

To this Bill, the Defendant *John Keir* pleaded the Will. The Plea set forth the Will and Attestation *in hæc verba*, and averred that the Will was duly signed and published by the Testatrix, in the presence of and attested by the three credible Witnesses above named; that the defendant had proved the Will in the Prerogative Court, and had obtained Letters of Administration of the Personal Estate of his late Wife, with the above Will annexed; that his late Wife was not, at any time during her Coverture with him, seised, possessed or entitled of or to, nor had any disposing Power over any Real or Personal Estate whatever, except the Real and Personal Estate comprised in the Marriage Settlement mentioned in the Bill, and except certain articles of Plate which belonged to her before her Marriage, and which remained at her Banker's in her Name, and except her Jewels and Paraphernalia, but over which Plate, Jewels

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and Paraphernalia, the Defendant averred he was advised she had no disposing Power.

The Plea now came on to be argued.

Mr. *J. Martin*, for the Bill, insisted that the Appointment was not duly made by the Will, and relied on *Moodie v. Reid (a)*.

Mr. *Sugden*, and Mr. *Rolfe*, for the Plea, admitted that the Power required that the Witnesses should attest the Signing and Publication of the Appointment; but insisted that the Declaration with which the Will concluded, was in effect a Publication as well as a Signing, and that the Witnesses, by adding their Names to this Declaration, attested both Facts.

The VICE-CHANCELLOR:—

The Argument for the Defendant supposes the Witnesses to be acquainted with the Contents of the Will. I cannot assume more from this Attestation than that they saw Mrs. *Keir* sign the Instrument.

Plea overruled.

(a) 1 Madd. 516; 7 Taunt. 355.

LORD SELSEY v. RHOADES.

1824.
9th, 10th & 11th
May.

*Principal and
Agent.*

THIS was a Bill to set aside, as fraudulent, a Lease of a Farm, which had been granted many years ago by *James Lord Selsey*, the Grandfather of the Plaintiff, to the Defendant, who was his Steward and confidential Agent.

In the year 1801, *James Lord Selsey* appointed the Defendant to be Steward, Agent and Receiver of the Rents of his Estates in the Counties of *Surrey, Sussex, Berks* and *Kent*, with an allowance of four per cent. on the clear annual Rents and Profits of Woods, besides the usual Fees as Steward of Manors. He continued to act as Steward on these terms till the death of *James Lord Selsey*, in 1808; and from that time continued in the service of *John Lord Selsey*, till his Lordship's death in 1816, in the same capacity, and on the same terms, except that his allowance was increased to five per cent.

The Bill stated that, in the course of his services, the Defendant became well acquainted with the value of the various Farms on the Estate; and that, availing himself of this knowledge, with a view to his own advantage or that of his Son, he applied, in 1803, to *James Lord Selsey*, and his Son, the Hon. *John Peachey*, afterwards *John Lord Selsey*, to grant him a Lease of

by a Surveyor named for that purpose by the Employer, and on a Valuation made in the manner usual with that Surveyor; and the offer of a higher Rent being known to the Employer before he executed the Lease.

Bill to set aside the Lease of a Farm granted to a Steward by his Employer, dismissed, with Costs; although the Lease was for a Term longer than was usual on the Estates, and was granted at the solicitation of the Steward, on an Agreement made before the subsisting Lease had expired, and at a Rent lower than was offered to the Steward on behalf of the occupying Tenant; it appearing that the Rent to be paid by the Steward had been fixed by the Employer, and that Surveyor; and the offer of a higher Rent being known to the Employer before he executed the Lease.

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two Farms, called *Preston Farm* and *Amberley Farm*: that it was considered inconsistent with his duties as Steward and Agent to grant him this Lease: but that he was very importunate, and although he desisted from his application as to *Preston Farm*, yet he persevered as to *Amberley Farm*, and promised that, if a Lease of it was granted to him, he would have a fair Valuation made and an adequate Rent set upon it previously to his taking it: That accordingly he caused the Farm to be valued by *Richard Eager*, a Surveyor, who fixed the Rent at 400 *l.* which the Defendant represented to be a full and fair Valuation, and that if he undertook to make Repairs and pay Taxes, the Rent, according to that Valuation, ought to be 330 *l.*: That upon this, an Agreement was entered into, dated the 2d of April 1804, by which *James Lord Selsey*, and the Hon. *John Peachey*, agreed to grant to the Defendant a Lease of *Amberley Farm*, for the term of twenty-one years from Michaelmas 1806: That at the time when this Agreement was entered into, that Farm was subject to a Lease, granted by *James Lord Selsey* to *William Holman*, which did not expire till Michaelmas 1806: That *James Lord Selsey* died in 1808; and, on the 4th January 1809, a Lease to the Defendant, for nineteen years from the Michaelmas preceding, was granted by *John Lord Selsey*, pursuant to the Agreement.

The Bill then charged the following circumstances as fraudulent in the transaction on the part of the Defendant: That shortly before the expiration of the Lease to *William Holman*, (who was then dead,) his Widow or Son, or his Executors, offered a Rent of 500 *l.* to the Defendant, as *Lord Selsey's* Steward, provided the Lease was renewed; but that the Defendant refused this offer, and did not communicate it to *Lord Selsey*: That the

Defendant obtained the Agreement for a Lease during the currency of *Holman's* Lease, for the purpose of preventing competition, and to secure the Farm to himself at a low and inadequate Rent: That a Lease for a term of twenty-one years absolute was unusual upon Lord *Selsey's* Estate, the Leases of which were generally made determinable at the end of seven and fourteen years; and that the Lease granted to *Holman*, the preceding Tenant, was determinable at the end of seven and fourteen years: That *Eager's* Valuation, according to which the Rent paid by the Defendant was fixed, was inaccurate as to the value of the Rights of Common and of the Tithes attached to the Farm: That neither *James Lord Selsey*, nor *John Lord Selsey*, were informed of the Rights of Common: That the Defendant, at the time when the Agreement to grant a Lease to him was entered into, knew that an Act of Parliament, for the Inclosure of the Common Lands in the Parish of *Amberley*, was in contemplation, and expected and knew that the value of the Farm would be greatly increased by that Inclosure: That the Plaintiff had the Farm surveyed in 1820, and found that it contained four hundred Acres more than was specified in *Eager's* Valuation; and that these four hundred Acres were an Allotment made under the Inclosure Act, in 1810, in lieu of the Rights of Common attached to the Farm, but that these Rights of Common had been entirely omitted in Mr. *Eager's* Valuation: That, upon the Survey in 1820, the Farm was valued by Mr. *Pinner*, a Surveyor, as worth 840*l.* per annum, at a fair Rent: That, in a Rental delivered by the Defendant to the Plaintiff in 1816, he represented *Amberley* Farm to contain five hundred Acres, although it did, in fact, contain, as Defendant then knew from a Plan in his possession, eight hundred Acres. The Bill also contained Allegations that the

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Defendant had used undue influence over *James Lord Selsey* and *John Lord Selsey*, by his having borrowed many sums of Money for them, which he procured to be lent by his own private friends, who might have been induced, at his instance, to require payment of the sums lent by them at times when it might have distressed their Lordships to procure Money to pay them.

The Prayer of the Bill was, that the Lease granted to the Defendant might be declared fraudulent and void, and be delivered up to be cancelled; and that it might be referred to one of the *Masters* of the Court to fix a fair occupation Rent for the Farm while in the Defendant's possession; and that he might be decreed to pay the difference between the Rent to be fixed by the *Master*, and that which he had paid under the Lease.

The Defendant, by his Answer, stated that he was, in 1803, desirous of having a Lease, on fair terms, of *Preston Farm* and *Amberley Farm*, for the purpose of establishing his Son, who, from his state of health, was not fit for any other pursuit than farming: That the reason why *James Lord Selsey* and his Son were averse to grant him a Lease of both Farms was, that they were afraid it might withdraw his attention from other pursuits, and might be misrepresented to his disadvantage; but that they both agreed to grant a Lease of *Amberley Farm* to the Defendant, the Rent to be fixed by valuation of a Surveyor; and that *James Lord Selsey* directed the Survey and Valuation to be made by Mr. *Eager*: That the Survey was accordingly made by Mr. *Eager*, who was not at the time aware that the Defendant was to be the Tenant: That, in September 1804, *William Borrer*, one of the Trustees and Execu-

tors of *Holman*, the preceding Tenant, (who had about a fortnight previously applied to the Defendant for a renewal of the Lease for *Holman's* Widow and Family, and was told he could not have it,) personally applied to *James Lord Selsey* for a renewal of the Lease, and, upon being informed by his Lordship that the Farm was engaged, he offered to give a larger Rent: That *James Lord Selsey* was surprised at this offer, and mentioned it to the Defendant, who thereupon wished to have the Farm re-valued, but that *Lord Selsey* declined having it re-valued, and expressed himself satisfied with *Eager's* Valuation: That the Defendant again pressed *James Lord Selsey*, by Letter, dated 25th April 1805, to have the Farm re-valued, or to see Mr. *Eager*; in reply to which *James Lord Selsey* wrote as follows:—"Both Mr. *Eager* and you may rest satisfied that I have no desire whatever to have recourse to any other opinion of his Valuation of *Amberley*, being perfectly persuaded of the rectitude of it; and, in order to confirm that opinion, I would have you immediately engage him for *Crowthall*:"—That, in October 1806, the Defendant having heard that *James Lord Selsey* wished him to give up the Farm, he wrote to his Lordship, mentioning that he had heard this, and offering to give it up, but that his Lordship wrote a Letter in reply, dated the 3d of October 1806, which concluded in these words:—"As to any vexation, or wish that you should now give it up, I have never had such an idea; and you may be assured that I do very sincerely wish you all the success in it that your own desires can lead you to hope, and your services deserve, from your's most truly, SELSEY."

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The Answer admitted that a Lease for twenty-one years absolutely was contrary to the usual mode of letting *Am-*

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Amberley Farm and other Farms on the Estate, though some of them were occasionally so let; and it also admitted that, at the time of the Agreement for the Lease, the Defendant had reason to know, suspect or believe, that very valuable and extensive Rights of Common were attached to the Farm, but that these Rights were disputed; that *Eager* knew of those Rights, and included them in his Valuation; and that both *James Lord Selsey*, and *John Lord Selsey*, knew of those Rights at the time of the Agreement. The Answer denied the charges of having or exercising undue influence over *James Lord Selsey*, or *John Lord Selsey*, by means of the way in which he borrowed Money for them, or otherwise; and stated that they possessed so much Money in the public Funds, as to be enabled at any time, if they had been suddenly called upon, to pay off more than all they had borrowed.

Many Witnesses were examined in this Cause on both sides. *Borver*, *Dennett* and *Coppard*, three of the Trustees and Executors of *Holman*, the former Tenant, who were examined on behalf of the Plaintiff, deposed that, at the time when they offered, by Letter, to *James Lord Selsey* a Rent of 500 *l.* a year for *Amberley* Farm, they did not know who was to be the Tenant; that the offer was made from a real desire to benefit *Holman's* Family; and that, at a Meeting of the Trustees of *Holman's* Will, in February 1806, it was resolved to offer even 600 *l.* a year for the Farm, in order to secure the benefit of it to *Holman's* Family. *Florence*, a Surveyor, examined also on behalf of the Plaintiff, deposed that he was satisfied that *Eager's* Valuation, as to the quantity of cultivated Land on the Farm, was correct; but that the Rights of Common appeared to him to have been erroneously omitted in that Valuation. *Hem-*

mingway, who was Surveyor to the Commissioners under the *Amberley* Inclosure Act, also a Witness for the Plaintiff, stated that, in 1812, he valued so much of *Amberley* Farm as lay within the Parish of *Amberley*, at 907 *l.* 13 *s.* 5 *d.* a year, and was convinced it would then have let for that sum; and likewise stated his opinion as to several inaccuracies in *Eager's* Valuation.

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Eager, who was examined for the Defendant, deposed that in the Valuation he had used all means usually adopted by him, and had done his best to fix a fair and proper Rent for the Farm, including the Tithes and Rights of Common: That, accompanied by *Foster*, the Bailiff employed on the Farm, he viewed all the Land which composed the Farm, and all over which Rights of Common existed or were claimed: That his Valuation was a fair and just Valuation; and that he estimated and included in it the Tithes. *Emery*, another Surveyor examined on behalf of the Defendant, deposed that the Rights of Common of *Amberley* Farm, before the Inclosure Act, were disputed and were interfered with; and that the Defendant had laid out above 1,500 *l.* on Repairs, Improvements and Buildings on *Amberley* Farm during the time it had been in his possession. *Pinnix*, another Surveyor examined on the part of the Defendant, and who had been employed in 1820 by the Plaintiff, Lord *Selwy*, to survey *Amberley* Farm, as mentioned in the Bill, deposed that he had examined *Eager's* Valuation and believed it to be correct; and that he would himself rather have taken the Farm in 1820, according to the Valuation which he then made of it, than have taken it in 1803 at the Rent fixed by *Eager*.

Many other Witnesses were examined on both sides; but their Evidence, and various other passages in the

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Pleadings, besides those already mentioned, were so fully stated in the Judgment of the *Vice-Chancellor*, that it is unnecessary to set them forth here.

The Cause now came on to be heard.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Blenman*, for the Plaintiffs:—

The Title of the Defendant must stand upon the adequacy of the Rent and the fairness of the transaction, and not as proceeding from any act of bounty towards him. It is, therefore, for the Defendant to show that he has obtained the Lease fairly. *Harris v. Tremenhoe* (a) clearly establishes the principle, that in such a case it lies with the Defendant to show that he has made as good a bargain for his Employer as against himself, as a provident Steward acting most advisedly would have made. A very important circumstance in this Case is, that the Valuation on which the Rent was fixed is the Valuation of a Reversion. It was made several years before the expiration of the then subsisting Lease. The Defendant, too, had not interposed any one to conduct the negociation; nor did he attempt to negotiate with any one except *James Lord Selsey* and *John Lord Selsey*.

Mr. *Heald*, and Mr. *Pepys*, for the Defendant:—

No Case of Fraud or Misrepresentation has been made out against the Defendant. The Case, therefore, is reduced simply to that of a Steward, who, being desirous of obtaining a Lease from his Employer, puts it into the hands of an experienced Valuer, and makes his Valuation the ground of his transaction with the

(a) 15 Ves. 34.

Landlord. In this Case, the Valuer was named by the Landlord himself, from the experience which he had of his skill in other Cases. In the Case of *Cane v. Lord Allen* (b) it was laid down that, where there is a Purchase by an Attorney from his Client, the Attorney must show that he has interposed somebody between himself and his Employer, and that he has communicated all the knowledge which he himself possessed as to the Value of the Property. That was what the Defendant, in this Case, has done. Before the Lease was granted, both *James* and *John Lord Selsey* were informed that the Rent reserved pursuant to the Valuation which had been made, was inadequate to the Farm. Upon this they made Inquiry, and the result of that Inquiry was, that the Lease was granted to the Defendant. There never was a Case in which there were stronger acts of confirmation, after circumstances had occurred to call the attention of *James* and of *John Lord Selsey* to consider the adequacy of the Rent agreed to be paid by the Defendant.

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The VICE-CHANCELLOR:—

In this Case, it is necessary to explain clearly the Principles upon which my Judgment proceeds.

There is no rule of policy which prevents a Steward from being a Lessee under his Employer. There is no rule of policy which prevents a Steward from receiving from the Bounty of his Employer a beneficial Lease. But where the transaction proceeds, not upon motives of Bounty, but upon Contract, there the Steward is bound to make out that he gives the full Consideration which it would have been his duty as Steward to obtain

(b) 2 Dow, 289.

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from a Stranger; and, where the transaction is mixed with motives of Bounty, there the Steward is bound to make out that the Employer was fully informed of every circumstance respecting the Property which either was within the knowledge of the Steward, or ought to have been within his knowledge, which could tend to demonstrate the Value of the Property and the precise measure and extent of the Bounty of the Employer.

These Doctrines may be considered as comprised in the general Maxim, that a Steward dealing with his Employer shall derive no advantage from his situation as Steward. The Employer may, if he pleases, treat with his Steward preferably to any other person; and this Preference is a Bounty. But the Steward cannot take advantage of this Preference, unless he fully imparts to his Employer all the circumstances of existing competition.

It is said, in this Case, that the Defendant obtained an Agreement for the Lease in question three years before the expiration of the subsisting Lease, with a view to prevent a competition which he expected from the occupying Tenant. If this were established in Evidence, there would be an end of the Case. It appears, on the contrary, by parts of the Answer of the Defendant which have been read by the Plaintiff, that, in or about March 1803, Mr. *Borrer* applied to the Defendant for a new Lease of the Farm, for the Widow or Son of *Thomas Holman*, who was the Brother of the original Lessee, *William Holman*; and that the Defendant observed that he thought Lord *Selsey* would not grant a new Lease without a Valuation; and that *Borrer* answered that a Valuation was not necessary, for that the Farm was worth no more than the present Rent; and that the

Defendant replied, whoever took the Farm must take it upon a new Valuation; and that the Defendant afterwards stated to Lord *Selsey* what had passed between him and Mr. *Borrer*; and inasmuch as the original Lessee, *William Holman*, had died without leaving any Family, this Application by *Borrer* suggested to him, the Defendant, that there would be no impropriety in treating himself for this Farm; and therefore, at the same time when he stated to Lord *Selsey* what had passed with *Borrer*, he applied to Lord *Selsey* to have the preference of the Farm for himself, to which Lord *Selsey* consented.

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It is said farther, by the Plaintiff, that, between the time of the Defendant's Agreement for the Lease and his actual Possession of the Farm under that Agreement, a formal offer had been made to the Defendant, by the Executors of *Thomas Holman*, to give the increased Rent of 500*l.* and that this offer ought to have been, and was not communicated to Lord *Selsey*.

If this proposition were true in fact, it might be questionable in principle; but the facts do not maintain it. Mr. *Dennett* and Mr. *Coppard*, two of the Trustees under *Thomas Holman's* Will, do indeed state in evidence that, in February 1806, they signed a Letter to the Defendant, making a formal offer of 500*l.* a year for the Farm, and that they were afterwards told by *Foster*, their Bailiff, that he had delivered this Letter to the Defendant. This Declaration of *Foster* is not Evidence; but, if it were so, the fact is immaterial, because *Borrer*, the other Trustee, swears that, before this Letter was written, he had himself seen Lord *Selsey*, and had made him an offer of the 500*l.* a year. When Lord *Selsey* therefore confirmed the Agreement with the Defendant, by permitting him to take Possession of the Farm, he was fully aware of this offer of 500*l.* a year;

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and it appears, by the Evidence of many Letters, that, in consequence of Mr. *Borrer's* offer, the Defendant proposed either to give up his Agreement altogether, or to submit to any new Valuation which Lord *Selsey* should think fit to order; and that Lord *Selsey*, expressing a marked confidence in Mr. *Eager's* judgment and integrity, determined to abide by his Valuation.

The point, however, which appears to be most insisted upon by the Plaintiffs, is that Mr. *Eager*, who valued the Farm at the Rent which the Defendant agreed to give for it, much under-rated the Right of Common which belonged to the Farm, and that the Defendant's Agreement fails therefore for want of a fair and adequate Consideration. It appears, in Evidence, that, in the Management of Lord *Selsey's* Estate during the Agency of the Defendant, it was the habit, when a Lease was about to expire, to have the Farm valued, and to re-let at the Valuation; and that Lord *Selsey* employed three different Surveyors in such Valuations, Mr. *Eager*, Mr. *Florance*, and Mr. *Emery*. When Lord *Selsey* consented that the Defendant should have *Amberley* Farm, it appears, by one of Lord *Selsey's* Letters, that his Lordship selected Mr. *Eager* for the Valuation of this Farm, and another Farm called *Rackham* Farm. It further appears that Lord *Selsey* had no Map or Plan of his Estate; and that Mr. *Eager*, being furnished with the Counterpart of the Lease of *Amberley* Farm, did, as upon other occasions, obtain his information as to the particulars of the Farm from Persons employed upon it, and principally from *Foster* the Bailiff, and an old Labourer.

I think the fair result of Mr. *Eager's* Evidence is, that although he did view the Commons over which the

Tenant of *Amberley* Farm claimed and exercised considerable Rights, yet, in consequence of the information which he received as to the disputed nature of those Rights, he did not put that Value upon them which would have belonged to them if the Rights had been undisputed. The nature of the dispute as to these Rights of Common, fully appears in the Evidence of Mr. *Florance*, Mr. *Emery*, and Mr. *Hanley* the Vicar. The Bishop's Copyholders insisted that the Tenants of *Amberley* Farm had only a Right in the surplus Feed, after the Copyholders had fed; and the Tenant of *Amberley* Farm insisted that he had an equal Right of Common with the Copyholders. When the Inclosure afterwards took place, in 1810, the Copyholders claimed their preferable right before the Commissioners, but were advised by Mr. *Tyler*, their Law Agent, that if they had such Right, they had lost it by not excluding the Tenant of *Amberley* Farm from intercommoning with them for many years; and, in consequence of this advice, the Tenant of *Amberley* Farm was permitted to share in the Commonable Lands equally with the Copyholders.

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I consider it therefore to be established as a fact that Mr. *Eager's* Valuation did not rate the Rights of Common appurtenant to *Amberley* Farm at the Rent which they afterwards proved to be worth to the Defendant. The question is, how this fact bears upon the present Case.

It is not and cannot, upon the Evidence, be contended here, that the Defendant had any other knowledge of the Rights of Common appurtenant to this Farm than was communicated to Mr. *Eager* by *Foster*; or that he could by any means have enabled Mr. *Eager* to come to any certain conclusion as to the result of the dispute

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with the Copyholders. The proportion of Rent to be fixed for the Commons was necessarily a speculative Rent; and Mr. *Eager*, employed by Lord *Selsey*, and utterly ignorant who might be his Lessee, cannot be chargeable with partiality against Lord *Selsey*; and it is therefore no just cause of complaint for those who now represent Lord *Selsey* that, in the event, Mr. *Eager's* Valuation proved more favourable to the Tenant than he expected.

Independent of the particular Objection as to the Rights of Common, the Plaintiffs have entered into general Evidence, to prove that Mr. *Eager's* Valuation was too low. They have proved the Valuation of Mr. *Hemingway*, the Surveyor employed under the Inclosure Act, who in 1810 valued *Amberley Farm*, without *Cold Waltham*, at 622 *l.* a year. And they have further proved that Mr. *Pinner*, in 1820, valued the whole of *Amberley Farm* at 840 *l.* a year. But there were two Witnesses, well acquainted with the Farm at the time of Mr. *Eager's* Valuation, Mr. *Emery* and Mr. *Braby*, who confirm Mr. *Eager's* Valuation; and Mr. *Pinner*, who fixes the Value of the Rent at 840 *l.* in 1820, says that he would rather have paid that Rent in 1820, than have paid in 1803 the Rent at which it was then valued by Mr. *Eager*. And, as to Mr. *Hemingway's* Valuation, it is obvious it can form no safe criterion of prior Value, because it appears in Evidence that the Farm had then been much improved by the Defendant, and because his Valuation comprises all the advantage which attended the Inclosure.

Another objection made by the Plaintiffs is, that Mr. *Eager*, in valuing the Tithes, under-rated the number of Acres. It turns out that Mr. *Eager's* mode of valuation.

of Tithes is, not to value according to the gross number of Acres, but to value upon what he considers to be the average number of Acres productive of Tithes.

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Another Objection is, that the Term of the Defendant's Lease being for Twenty-one years, was out of the usual course of Management of Lord *Selsey's* Estate. The fact, which depends entirely upon a passage in the Defendant's Answer, is not distinctly made out; but, if it were, it does not seem to me to be material; because the length of the Term was obviously intended to be an indulgence and kindness to the Defendant, in respect of his intention of placing his Son upon the Farm; and there is no rule of policy which prevents this Bounty from the Employer to his Steward.

I do not think it necessary to advert more particularly to the alleged misrepresentation of the Quantity of Acres in *Amberley Farm* in the Rental of 1817, which in itself is nothing, and could only be used in aid of other presumptions. *James Lord Selsey* lived till February 1808, and *John Lord Selsey*, also Party to the Agreement with the Defendant, till the 25th of Julie 1816; and no Question appears to have been raised with the Defendant until 1820.

Upon the whole, therefore, I am of opinion that the Lease granted to the Defendant is not to be avoided in respect of the relation in which the Defendant stood to the Lessor, and that this Bill must be dismissed, with Costs. If the present Lord *Selsey* is advised that he can impeach this Lease on another ground, that it is a Fraud upon the leasing power, the Law will still be open to him.

Bill dismissed, with Costs.

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13th May.

*Pleading.
Annuity.*

DUNN v. CALCRAFT.

THIS was a Petition of Rehearing.

Unless a defect in the Memorial of an Annuity is stated in the Pleadings or Evidence, no advantage can be taken of it.

The Bill was filed to establish a Lien upon a Fund in Court, in respect of the Arrears of an Annuity due to the Plaintiff.

In March 1793, *Charles Sturt*, being Tenant for life of considerable real Estates, conveyed them to Trustees, upon Trust to apply the Rents and Profits, in the first place, in payment of an Annuity of 2,400 *l.* and, subject thereto, in Trust for himself. By an Indenture, dated the 3d of April 1793, *Charles Sturt* granted to *Edward May* two Annuities of 125 *l.* each, one for the term of one hundred, and the other for the term of one hundred and one years, if he (*Sturt*) should so long live, and charged them upon all his Interest in the real Estates comprised in the Deed of March 1793, which were demised to a Trustee for the purpose of securing payment of these two Annuities. In July 1793, *Richard Packer* purchased the former of these two Annuities of *Edward May*, for 850 *l.* and had it duly assigned to him by Deed, to which *Sturt* was a Party, together with all Arrears. After this the Trustees under the Deed of March 1793 entered into receipt of the Rents and Profits of the real Estates.

In the year 1800, *Richard Packer* filed his Original Bill in this Court, against *Charles Sturt* and these Trustees, for an Account of the Arrears of the Annuity which he had purchased, and for an Account of the Rents and Pro-

fits received by the Trustees, and to have them applied in payment of his Annuity, subject to the payment of the prior Annuity of 2,400 *l.* To this Bill *Sturt* and the other Defendants put in their Answers; but it did not appear that they alleged any objection to the validity of the Annuity claimed by *Packer*. The Answer of *Sturt* denied that he had received the whole Consideration Money. The Trustees admitted that they had entered into Possession, but alleged that the Rents and Profits were not sufficient to keep down the Annuity of 2,400 *l.*

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By Indentures dated the 4th and 5th of January 1803, *Sturt* conveyed his real Estates, subject to prior charges, to *Runnington* and others, as Trustees, for the benefit of his Creditors. After this, one *Scott*, claiming as a specialty Creditor of *Charles Sturt*, filed his Bill against *Portman*, one of the Trustees under the will of *Sturt's* father, and others, praying that the Trusts of this last Deed might be executed. Answers were put in to *Scott's* Bill, by which the Trustees in possession of the Estates admitted large Balances in their hands in respect of Rents and Profits, after payment of the Annuity of 2,400 *l.*

In 1812, *Charles Sturt* died, having made his Will, and appointed *John Calcraft* his Executor, who proved the Will.

Soon after *Sturt's* death, *Bowen*, and other persons claiming as his Creditors, filed their Bill against his Executor, and against the Trustees of the Deed of 1803, for an Account of *Sturt's* Assets, and to have them applied in a due course of Administration. In December 1813, on a Motion made in these two last Causes, *Scott v. Portman*, and *Bowen v. Runnington*,

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the Trustees were ordered to pay into Court, on account of Rents and Profits in their hands, several Sums, amounting in the whole to 7,457 *l.* 6 *s.* 4 *d.* These Sums were paid in accordingly, and invested in Stock.

Packer then filed a Bill of Revivor and Supplement, alleging that these Causes had been instituted, and the Money paid into Court, without any notice to him, and that he was designedly kept in ignorance of them; and praying that the Fund in Court, in the other Causes might be applied in payment of the Arrears of his Annuity of 125 *l.*

In December 1814, *Joseph Dunn* purchased of *Packer* all his Interest in the Annuity and the Arrears, and it was assigned to him accordingly. *Dunn*, thereupon, filed his Bill of Revivor and Supplement, in which he waived all further Accounts of Rents and Profits against the Trustees, being satisfied that the Fund in Court was sufficient to answer his Claim; and therefore praying that it might be declared that the Fund in Court was liable to the Arrears of his Annuity.

The Answer of *Calcraft*, *Runnington*, and the other Defendants stated that they, or any or either of them, could not, as to their knowledge, information or belief, answer and set forth, save as it appeared by the Bill, whether *Sturt* duly executed the Grant of the Annuity, nor whether the Indenture of Assignment to *Packer* was duly executed, nor whether, at the time of filing his Bill, *Packer* became and was well entitled to the Annuity; but they submitted to the Court that the surplus Rents and Profits of the Estates were not applicable to the payment of the Arrears of this Annuity, otherwise than as a Debt owing by *Charles Sturt* to

Packer, as a general Creditor; and they also submitted that *Dunn* was not entitled to have the Funds in Court sold and applied in payment of the Arrears of the Annuity of 125*l.*, inasmuch as he had not (as they submitted) any specific Lien on those Funds.

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The execution of the Deed of Assignment to *Packer*, to which *Sturt* was a Party, and payment of the Consideration Money, were proved on the part of the Plaintiff.

When the Cause came on to be heard before the *Vice-Chancellor*, a Decree was made, referring it to the *Master* to inquire and state to the Court whether the Plaintiff *Dunn* was entitled to any and what Annuity charged upon the Estates in question; and, in case the *Master* should find that the Plaintiff was entitled to an Annuity, then it was declared that he had a Lien upon the Funds in Court for the Arrears of it.

While the Proceedings in the *Master's* Office under this Decree were depending, the Defendants, for the first time, took objections to the validity of the Annuity, and contended that it had become void by reason of the Memorial of it, enrolled in Chancery, not stating a Proviso for Redemption which was contained in the Deed. The *Master* entered into the consideration of this objection, and reported that a sufficient Memorial had not been enrolled, and, therefore, that the Plaintiff was not entitled to any Annuity.

The Plaintiff took Exceptions to the *Master's* Report; and, on the argument of them, contended that the Defendants were not entitled to raise such an objection to the Annuity, as that point had not been put in issue.

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The Court, however, thought, that, in order to raise the question whether it was or was not too late to make the objection to the validity of the Annuity, there must be a rehearing of the Cause. A Petition of Rehearing was therefore presented, and it now came on to be heard.

Mr. Hart, Mr. Barber, and Mr. Stuart, for the Plaintiff:—

The execution of the Deeds under which the Plaintiff claims was proved in the Cause. The question as to the validity of the Annuity might have been put in issue by the Defendants if they had chosen it, but they did not put in issue any thing as to the validity of the Memorial. It is now fully settled that, if the Grantor of an Annuity means to question the validity of it in any Action or Suit which seeks to recover the Annuity, he must state his specific objection to the Annuity. If, instead of putting any specific objection in issue, the defence is merely, as in this Case, an averment of ignorance whether such an Annuity was granted, the Plaintiff has only to prove the execution of his Deed. The Bill, in this Case, contains no averment that a Memorial of the Annuity was duly enrolled. In *Mosely v. Taylor*, a Case lately heard before the *Lord Chancellor*, a Bill was filed to recover the Arrears of an Annuity, alleging a Breach of Trust. The Answer to the Bill stated that the Defendant did not know whether the Annuity Deed had been executed. The Case was heard at the Rolls, before Sir *William Grant*, and a Decree was made, which directed a Reference to the *Master*. After the Decree, it was found that the Annuity was invalid. The Cause was therefore brought on for a rehearing before the *Lord Chancellor*, when his Lordship held that the objection to the Annuity

had not been put in issue by the Defendant in such a manner as to entitle him to avail himself of it. No formal decision was given in that Case; but the Opinion of the *Lord Chancellor* was so clearly expressed that the Party was induced to abandon the Appeal. It is decided that, at Law, if an Action is brought on an Annuity Deed, it is enough for the Plaintiff to declare on the Deed, and, if the Defendant pleads the general Issue, he is not entitled to go into particular objections to the form of the Memorial, in order to impeach the Annuity. *Buck v. Tyte (a)*, *Doe v. Mason (b)*, *Simmons v. Hunt (c)*.

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Mr. *Sugden*, and Mr. *Newland*, for the Defendants, insisted that it was open to the Defendants to state any objection to the Annuity; and that, in point of fact, the Defendants, who were mere Trustees, could not raise such objections in any other way: that, until the Plaintiff proved all the Deeds under which he made out his Claim, they could not be aware whether his Claim was objectionable or not: and that, if it were otherwise, any Annuity, however void, might safely be claimed after the death of the Grantor; because the Defendants, on the principle contended for by the Plaintiff, could never have an opportunity of investigating his Title.

The VICE-CHANCELLOR:—

The objection to the validity of the Annuity for want of a sufficient Memorial, is not hinted at in any of the Answers. The only objection taken by Mr. *Sturt* is, that he never received any Consideration for the Grant. But the Plaintiff has proved the payment of the Consideration expressed to Mr. *May*, the Agent to Mr. *Sturt*.

(a) 7 T. R. 495. (b) 3 Campb. 7. (c) 1 Marsh. 155.

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The Memorial is not a constituent part of the Grantee's Title, but is matter collateral, for want of which in due form, the Grant may be defeated; but that matter collateral must be shown. The Court must proceed upon the Pleadings and Proofs in a Cause; and, upon these Pleadings and Proofs, I am not authorized to question the Title of the Plaintiff to this Annuity. The language of the Decree must, therefore, be corrected according to the original intention of the Court, so as to leave it open to the *Master* to inquire into the amount of the Arrears, but not into the validity of the Annuity.

Reg. Lib. 1823, B. f. 1319.

MITCHELL v. HAYNE.

1824.
28th May.

*Auctioneer.
Interpleader.*

THE Plaintiff was an Auctioneer, and had sold an Estate for one of the Defendants. The other Defendant was the Purchaser, and had commenced an Action against the Plaintiff for the Deposit; upon which the Plaintiff filed a Bill of Interpleader against him and the Vendor, and prayed for an Injunction to restrain the Action.

If an Action is brought against an Auctioneer for a Deposit, he cannot file a Bill of Interpleader, if he insists upon retaining either his Commission or the Duty.

Mr. *Agar*, and Mr. *Crombie*, for the Plaintiff, now moved for the Injunction, and offered to pay the Deposit Money into Court, after deducting the Duty and Commission.

Mr. *Kee*, for the Purchaser, opposed the Motion.

The VICE-CHANCELLOR:—

Interpleader is where the Plaintiff is the Holder of a Stake which is equally contested by the Defendants, as to which the Plaintiff is wholly indifferent, between the Parties, and the right to which will be fully settled by Interpleader between the Defendants. That is not this Case. The Plaintiff receives a Deposit of 87 *l.* 18 *s.* 9 *d.*, and claims, against both the Defendants, to retain 27 *l.* 16 *s.* 10 *d.* for his Commission and the Auction Duty. And, by this Motion, the Plaintiff calls upon the Defendants to interplead for the sum of 60 *l.* 1 *s.* 11 *d.*, which he desires to pay into Court. But the Bill itself states that the Action which is threatened by the Defendant, the Purchaser, is for the

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whole Deposit of 87 *l.* 18 *s.* 9 *d.*, and not for the sum of 60 *l.* 1 *s.* 11 *d.* only, which is all that the Defendant, the Vendor, could claim. The Plaintiff is not, therefore, an indifferent Stakeholder, but has a personal question to maintain with the Defendant, the Purchaser; and, if he seeks an Injunction, must obtain it, not upon the principle of Interpleader, but upon an Order for Time, or upon the Answer.

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 21st June.

Practice.
Rehearing.

Where, by mistake, Sums paid into Court under the Decree were included in the Balances reported due from the Defendant; and the Decree, on further directions, ordered those Balances to be paid into Court; held that the mistake could not be rectified without rehearing the Cause on the latter Decree.

BROOKFIELD v. BRADLEY.

THIS was a Creditor's Cause. The Defendants, the Executors, in their Answer admitted that they had in their hands certain Sums, part of the Testator's personal Estate and of the Rents and Profits of his real Estates. The Decree directed the *Master* to inquire how much of these Sums was produced from the personal Estate, and how much from the real Estate, and that the Executors should pay them into Court, to be placed to the Accounts of the personal Estate and of the real Estate respectively; and the *Master* was also to take the usual Accounts of the personal Estate, and of the Rents and Profits of the real Estate possessed by the Executors. The *Master* made his Report, stating the parts of the Sums mentioned in the Answer which consisted of real and personal Estate, and also stating the Balances due from the Executors, which included the Sums mentioned in their Answer. Pursuant to the Decree and Report, the Executors paid into Court the Sums mentioned in their Answer, which were accordingly carried over to the Accounts of the real and personal Estate.

The Cause was afterwards heard on further directions, when the fact of these Sums having been paid was omitted to be noticed, and the Decree directed that the Executors should pay into Court the whole Balances reported due from them, part of which was directed to be placed to the Account of the personal Estate, part to the Account of the real Estate devised, and part to the Account of the real Estate descended.

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The Executors now presented a Petition, praying that the Decree made on further directions might be corrected, and that they might be ordered to pay into Court the difference between the Balances found due from them and the Sums already paid in; and also praying the proper directions for apportioning the Sums already paid in and those to be paid in, and carrying them over to the different Accounts of the personal Estate, the real Estate devised, and the real Estate descended.

Mr. *Hart*, and Mr. *Garratt*, in support of the Petition, cited *Weston v. Haggerston* (a), where an error in a Decree was corrected upon Motion; and submitted, that as the other Parties to the Cause did not object, the mistake which had occurred in this instance might be set right without the necessity of a Rehearing.

THE VICE-CHANCELLOR :—

The Case of *Weston v. Haggerston* applies only to errors of Figures apparent upon the face of the Decree. Here the Cause must be reheard. It is not only necessary to strike out the Order of payment by the Defendant, but to insert new directions upon the corrected fact.

(a) Coop. 134.

1824.
21st June.

*Charity
Jurisdiction.*

The Court has no jurisdiction under the 52d Geo. 3. c. 101. to direct, upon Petition, an Account of the Assets of a Person who had received the Rents of a Charity Estate.

IN THE MATTER OF ST. WENNS CHARITY.

THIS was a Petition, presented under the 52d Geo. 3. c. 101, relating to a Charity founded in the 15th Charles 2. It stated that *Philip Rashleigh*, from 1764 until June 1811 (when he died), had managed the Charity; and that, at his death, there remained in his hands a large surplus of the Rents of the Charity Estates: That his Executors had possessed his Personal Estate, and divided the Residue amongst his residuary Legatees. The Petition therefore prayed for an Account of the Rents of the Charity Estates received by *Philip Rashleigh*; that what should be found due might be paid by his Personal Representatives out of his Assets; and that, if they should not admit Assets sufficient to answer what should be found due, the usual Accounts might be taken of his Personal Estate.

The Petitioners were the Trustees of the Charity Estates, who had been appointed by an Order made in the year 1818. *Philip Rashleigh's* residuary Legatees had not been served with a Copy of the Petition.

The *Solicitor General* and Mr. *Lougley* for the Petitioners.

Mr. *Heald* for *Philip Rashleigh's* Representatives.

The *Vice-Chancellor* dismissed the Petition with Costs, because the residuary Legatees of *Philip Rashleigh* had not been served with the Petition; and because he had no jurisdiction under the Act to direct an Account of *Philip Rashleigh's* Personal Estate as against his Personal Representatives.

The ATTORNEY GENERAL v. HEELIS.

1824.
3d June.

*Charity.
Pleading.*

THIS was an Information and Bill, in which ten Persons were the Relators and Plaintiffs, on behalf of themselves and all the other Tenants and Occupiers of Houses and other Premises situate in *Great Bolton*, in the County of *Lancaster*, subject to the Rates or Assessments, and entitled to the benefit of the Acts of Parliament after mentioned. The Defendants were the Trustees under those Acts of Parliament.

Where a Common was inclosed under an Act of Parliament passed with the consent of the Proprietors, and was vested in Commissioners, upon trust to apply the Rents for the improvement of a Town, with power to them to levy a Rate on the Inhabitants in case the Rents proved deficient, an Information and Bill being filed by some of the Inhabitants, on behalf of themselves and the others, against the Commissioners, for an Account of the Rents, alleging

An Act of Parliament was passed in the 32d Geo. 3, with the consent of the Lords and Proprietors of the Common called *Bolton Moor*, for inclosing that Common, and widening, paving, lighting, watching, cleansing, and regulating the Streets of *Great Bolton* and *Little Bolton*, and supplying those Towns with Water, and with Fire-Engines, and Hackney Coaches and Chairs. The Act appointed certain Commissioners and Trustees for effectuating the purposes of the Act, and directed them after setting out Highways, and making certain Allotments, to set out all the remainder of *Bolton Moor* in Lots, and to sell and demise them for a term of five thousand years, reserving a Rent, subject to the immediate payment of 10*l.* an Acre, and out of the Money to be produced thereby to defray Two-

misapplication, and that a Rate levied was unnecessary; held, on general demurrer, 1st, that the Funds constitute a Charity; and 2d, that the object of the Suit being to avoid the Rate, the Plaintiffs had a right to sue on behalf of themselves and the other inhabitants.

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thirds of the Expense of passing the Act, and the Expenses of the Commissioners, and to pay the Residue into the hands of a Treasurer, to be appointed by the Trustees, for the uses after mentioned. And it enacted, that the Clerk of the Trustees should cause regular Entries of the proceedings of the Trustees to be made in Books to be kept for that purpose, and that such Entries should be evidence in all Courts, and the Books to be open to the inspection of all persons who should be taxed and assessed for the purposes of the Act. The Act also empowered the Trustees to put up Lamp-posts and Irons in the Towns of *Great* and *Little Bolton*, and to contract for paving, lighting, and cleansing the Streets of those Towns, and for conveying Water thereto, and for appointing Watchmen, and to build and provide a House and Offices for the use of the Peace Officers of those Towns, and to make Sewers and Drains. And it enacted that whenever the Monies coming to the hands of the Trustees for *Great Bolton*, from the Lands and Grounds thereinbefore directed to be sold, should be insufficient to defray the Costs, Charges, and Expenses of carrying into execution the purposes of that Act within the Town of *Great Bolton*, then and in every such case, but not otherwise, it should be lawful for the said Trustees, once in every Year, or oftener as occasion should require, to ascertain the sum or sums of Money to be raised by Rates or Assessments on the several Inhabitants of the Town for the purposes aforesaid, and to raise thereby such sum or sums of Money, from time to time, not exceeding in the whole the sum of Two Shillings and Sixpence in the Pound in any one Year, upon the several Tenants and Occupiers of all Messuages, Houses, Warehouses, &c. within the Town of *Great Bolton*; and power was thereby given to levy these Rates and Assessments by Distress.

The Act also contained a power to the Trustees to borrow Money at Interest, or by way of Annuity, upon the credit of the Rents, Rates, and Assessments before mentioned, the sums so borrowed to be applied only for the purposes of the Act. It likewise provided that if the Rents arising from the allotments of the Land should be more than sufficient to defray the Expenses of executing the purposes of the Act in the Town of *Great Bolton*, and there should be no Money due on Mortgage or Annuity, on the credit of the Rents, Rates, and Assessments, in every such case the Overplus remaining in the hands of the Trustees on the 29th of September in every Year should be by them paid over to the Overseers of the Poor of the Town of *Great Bolton*, for the time being, to be by them applied in the same manner as the Rates for the relief of the Poor within the Town. The Act contained a clause enabling the Commissioners to sue and be sued in the name of their Secretary; and also a clause giving jurisdiction to the Duchy Court of *Lancaster* as to all matters of a Civil nature relating to the purposes of the Act.

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Another Act for granting further power for improving the Town of *Great Bolton* was passed in the 57th Geo. 3. By this Act further powers were granted to the Trustees appointed under the former Act, enabling them to re-sell certain Lots of *Bolton Moor*, for the purposes of the Act; and it was enacted, that no person should act in the capacities both of Clerk and Treasurer; and that the Trustees should cause a Book to be kept by their Clerk, in which such Clerk should enter a regular Account of all sums of Money paid and received on account of the two Acts of Parliament, and for what the Sums

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were paid, which was to be open to the inspection of any person who should pay to any Rate or Assessment to be made under the Act ; and all such persons were to be at liberty to take Copies thereof and inspect them.

After setting forth these Acts, the Information and Bill stated, that the Commissioners and the Trustees had proceeded to allot and dispose of *Bolton Moor*, and had paid over into the hands of their Treasurer large sums of Money produced from that source ; but had expended these Sums in a manner which the Plaintiffs could not discover ; and had not applied them for the purposes required by the Acts of Parliament : That the Sums received for Rents of the Allotments were very large, and were sufficient for the purposes of the Act, without borrowing any Money or levying any Rate ; but that no Accounts had been kept or entered in Books according to the directions of the Act of Parliament : That the Defendants had refused to allow the Plaintiffs to inspect their Books, and that the Clerk of the Defendants had, under their directions, refused such Inspection : That the Defendants had misapplied the funds received under the Acts of Parliament, and had alleged that the Funds received from the Rents were insufficient for the purposes of the Act, and imposed upon the Inhabitants of *Great Bolton* a Rate of Sixpence in the Pound under the powers conferred by the Acts, and had issued Warrants of Distress to levy this Rate.

The Information and Bill charged that no Rate was necessary ; that this was the first Rate which had been imposed under the authority of the Act, and that it had been imposed by a very small majority of the Trustees, and since it had been imposed that several of the Trustees

had declared that no such Rate was necessary. It therefore required the Trustees to discover how the Funds had been applied by them, and insisted that, under the circumstances mentioned, the Defendants should be prevented from enforcing the Rate, and charged that they had no other means of preventing the Warrants of Distress for levying the Rate from being executed, but by the interference of this Court.

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The prayer was, That the Trust Funds vested in the Defendants might be administered under the direction of the Court: That an Account might be taken of all the Estates, Rents, and Property vested in the Defendants under the Acts of Parliament set forth in the Information, so far as those Acts related to the Town of *Great Bolton*; and also an Account of all Payments duly made by the Defendants; and that it might be declared that the Defendants were personally liable to pay, and might be decreed to pay what should be found, upon taking the Accounts, to have been improperly expended by them; and that it might be declared that the Rate or Assessment mentioned in the Information ought not to be raised, and ought to be quashed; and that the Defendants might be restrained by Injunction from issuing any warrants of Distress for levying the Rate.

To this Information and Bill the Defendants put in a general demurrer for want of Equity.

Mr. *Horne* and Mr. *Pemberton* for the Demurrer:—

I. No six individuals, nor any number of individuals, have a right to institute such a Suit as this. The question is one of the greatest importance. In a Case lately

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before the *Lord Chancellor*, *Jones v. Del Rio*, where certain Subscribers to the Peruvian Loan filed a Bill on behalf of themselves and all other persons Subscribers to the Loan, for an account of the Subscription Monies, and to rescind the Contract, the *Lord Chancellor* held that a Party was not entitled thus to assume the character of representative of all the Subscribers, and had no right to maintain such a Bill. Upon the present case it must be decided, whether any Five or Six Paupers in a Town have the right to institute a Suit on behalf of themselves and the People of the Town, against all the principal Inhabitants, touching any Assessments for local and public purposes?

II. The Funds in this Case are not a Public Charity. *Attorney General v. Brown (a)*. In that Case the Court went a great way to hold that Funds arising under an Act of Parliament, and applicable to a public purpose, were Charitable Funds. But in this Case, where the Funds in respect of which alone the Plaintiffs are interested, arise merely from an Assessment under the authority of an Act of Parliament, for the purpose of improving a Town, it is going a step farther than any authority warrants to consider it as the case of a Public Charity.

III. If there has been such misconduct as the Information alleges, the proper course was to take proceedings at Law, and not to come to the Court of Chancery. Besides these objections, the clauses in the Act of Parliament which give jurisdiction to the Duchy Court of *Lancaster*, and which direct that the Commissioners shall sue and be sued in the name of their Treasurer, who is

(a) 1 Swan. 265.

the party possessed of all the Funds, are strongly against the right to institute such a Suit as the present.

Mr. *Hart* and Mr. *Spence* for the Relators and Plaintiffs:—

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I. The main question is, whether the subject of this Suit is not a Charitable Institution, in the enlarged sense in which this Court considers the term Charity? According to all the principles on which this Court acts, and according to all the authorities on which those principles have been stated and recognized, this must be held to be a general Charitable Institution, in which all the Inhabitants of the Town of *Great Bolton* are interested. In *Hovse v. Chapman* (b), where a Testator gave by his Will portions of his Property to his Executors, to be by them converted into Money, and directed certain Payments to be made out of the Money so to be produced, and went on in these words, “ And in the next place, my will is, that the Residue of the Money be appropriated to the improvement of the City of *Bath*, and be placed by my Executors in the Bank of Messrs. *Hobhouse & Co.* in this City, at the rate of three per Centum per Annum, and that it shall be drawn out of the said Bank as the Improvements shall require.” Lord *Rosslyn* declared that these words constituted a Charitable Bequest. It is, therefore, clearly established, that a gift by an Individual of Funds for the improvement of a Town, constitutes a Charity. But it was not necessary that the Fund should proceed from the gift of an Individual, provided it were applicable for a general public purpose. Here there was a general dedication of the Property, which, though it flowed from the Parish at large, was as much a Chari-

(b) 4 Ves. 542.

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table Institution as if it proceeded from One Individual. The Case of *The Elephant and Castle Charity* (c), is of the same kind. It was Common Land given by the Lord of the Manor for the maintenance of a School; yet it was never thought of contending that it was not within the jurisdiction of this Court as a Charity. If Common Lands dedicated to the improvement of a Town be a Charity, there can be no doubt the Court has jurisdiction, and the *Attorney General* has a right to sue in this Court to have it properly administered. *Gort v. Attorney General* (d).

II. The next question raised is, whether it be competent to add individual rights to the general right of the Charity, so as to seek relief in respect of both in the same Suit? The Case of *Jones v. Del Rio*, which has been mentioned, has no application and involved no question as to a general right or a public institution. In *Adair v. the New River Company* (e), it was established, that, where Parties are so interested in the subject matter of a Suit that it would be imperfect unless they were represented before the Court, but are so numerous as to make it inconvenient to join them all individually as Parties, the Court allows a sufficient number of them to be made Plaintiffs and Defendants, as on behalf of themselves and the others. All that the Court looks to in such Cases is to see whether there be a sufficient number of Parties to enable the question to be properly decided.

The other objections are of no weight. Could it be said that Replevin would be a remedy against the Distresses

(c) Now before the Lord Chancellor. (d) 6 Dow. 137.

(e) 11 Ves. 489.

issued under the power contained in these Acts? If so it could only be by having, perhaps, a thousand separate Replevins, and having a Court of Law to pronounce upon the administration of Trust Property.

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Mr. *Pemberton*, in reply :—

The Acts of Parliament can not be so construed as to constitute the Defendants Trustees. The Acts give a discretion to them, with the consent of the Majority, as to the mode in which the Funds should be applied for the benefit of the Town. It might be, for any thing that now appears, that the Majority of the Inhabitants concurred with the Defendants, and that the Plaintiffs were the only Inhabitants who made any objection. If that were so, it would be impossible to say that this Information and Bill could be maintained.

The VICE-CHANCELLOR :—

This is an Information and Bill by *The Attorney General* and certain persons, on behalf of themselves and all others, who are assessed to a Rate made under the authority of the Defendants, insisting that the Defendants are in effect Trustees for certain Charitable Purposes, with power to make the Rate in question only in case the Charitable Funds are insufficient, and that the Charitable Funds are ample for the purposes required; and praying, therefore, amongst other things, an Account of the Charitable Funds, and of the Application thereof by the Defendants, and that in the meantime the Defendants may be restrained from enforcing the Payment of the Rate so made by them. To this Bill the Defendants have put in a general Demurrer, and the first point made by them is, that the Plaintiffs to the Bill have not a right to sue on behalf of all other persons on whom the Rate in question is assessed; and a late Case of *Jones*

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Where the object of a Suit is to avoid payment of a Rate levied on the Inhabitants of a Town, all the Inhabitants having a common interest to avoid the Rate, any one or more of them may sue on behalf of himself and the other Inhabitants.

Funds supplied from the gift of the Crown or of the Legislature, or of private persons, for any legal public or general purpose, are Charitable Funds, to be administered by Courts of Equity.

v. Del Rio, before the *Lord Chancellor*, is cited as an authority for that proposition. There the Plaintiff, being one of the Subscribers to the Peruvian Loan, filed a Bill on behalf of himself and all other Subscribers to that Loan, to rescind the Contracts of Subscription, and to have the Subscription Monies returned. The *Lord Chancellor* held that the Plaintiff was not entitled in that case to represent all others the Subscribers, for that it did not necessarily follow that every Subscriber should, like the Plaintiff, wish to retire from the speculation, and that every individual must judge for himself in that respect. The principle of that case has no application here. The object of the Bill is to avoid the payment of the Assessment in question, and every individual assessed has in that respect one common interest.

The next and most important point made by the Defendants is, that this is not a Case in which a Court of Equity has jurisdiction to compel an Account. It must be admitted that a Court of Equity has, in this case, no authority to compel an Account, unless the Funds in question are Charitable Funds. In the Case of the *Attorney General v. Brown*, which has been much referred to in the argument, I had occasion to consider this sort of subject very fully. I am of opinion, that Funds supplied from the Gift of the Crown, or from the Gift of the Legislature, or from Private Gift, for any legal, public, or general purpose, are Charitable Funds to be administered by Courts of Equity. It is not material that the particular public or general purpose is not expressed in the Statute of Elizabeth, all other legal, public, or general purposes being within the Equity of that Statute. Thus, a Gift to maintain a preaching Minister; a Gift to build a Sessions House for a County; a Gift by Parliament of a Duty on Coal imported into London, for the purpose of rebuilding

St. Paul's Church, after the Fire in London; have all been held to be Charitable Uses within the Equity of the Statute of Elizabeth.

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I am of opinion that it is the source from whence the Funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable; and that Funds derived from the Gift of the Crown, or the Gift of the Legislature, or from Private Gift, for paving, lighting, cleansing, and improving a Town, are, within the Equity of the Statute of Elizabeth, Charitable Funds to be administered by this Court. But where an Act of Parliament passes for paving, lighting, cleansing, and improving a Town, to be paid for wholly by Rates or Assessments to be levied upon the Inhabitants of that Town, the Funds so raised, being in no sense derived from Bounty or Charity, in the most extensive sense of that word, are not Charitable Funds to be administered by this Court.

Where a Fund applicable for a public or general purpose is derived wholly from Rates or Assessments under an Act of Parliament, being in no respect derived from Bounty or Charity, it is not a Charitable Fund to be administered by a Court of Equity.

To apply these principles to this Case. The Funds vested in the Trustees to be in the first place applied in the improvement of the Town of *Great Bolton*, are the Purchase Monies, Rents, and Profits of a certain part of *Bolton Moor*, which the Commissioners are by the Act of Parliament authorized to sell for a term of five thousand years, reserving a Rent. Before the passing of this Act, *Bolton Moor* was the property of the Lords of the Manor of *Bolton*, and of certain Persons, Owners, and Proprietors of certain Lands, Messuages, and Tenements within the said Manor, who had Rights of Common on the Moor. The Act of Parliament, with the consent of the Lords and Persons having rights of Common on the Moor, dedicates the property of a very large part of this Moor to the improvement of the Town of *Great Bolton*. This is, in effect, a Gift by the Lords and Persons having Rights

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of Common for the public purpose of improving the Town, and the Funds given are therefore Charitable Funds to be administered by this Court.

It was said that the Defendants, the Trustees, do not, under the provisions of the Statute, possess these Funds, and are not therefore to Account for them: that the Treasurer alone possesses them. Upon looking into the provisions of the Statute, in this respect, I am of opinion that the Trustees do possess, and administer these Funds, and are accountable for them, and that the Treasurer is merely their servant (*f*).

Let the Demurrer be over-ruled.

(*f*) See Mitf. Pl. 3d Edit. 137.

1824.
25th June.Solicitor.
Costs.

HALL v. BENNETT.

THE Bill in this Case had been dismissed with Costs for want of Prosecution.

Bill filed by a Solicitor on instructions furnished by the Brother-in-law of the Plaintiff, without any communication with the Plaintiff himself, being dismissed with Costs; the Solicitor ordered to pay the Costs, it appearing that the Plaintiff had absconded before the Bill was filed.

The Court was moved on behalf of *Feavor* and *Marshall*, two of the Defendants, that the Solicitor, who had filed the Bill for the Plaintiffs, might pay the Defendants their taxed Costs, on the ground that the Plaintiff had absconded eight years before the Bill was filed; and that the Solicitor, who filed it, never had any communication with him, and did not receive his instructions from him, but from his Brother-in-Law.

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Mr. *Pemberton*, for the Motion, relied on *Wilson v. Wilson (a)* and *White v. Stanley (b)*.

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Mr. *Horne*, for the Solicitor, opposed the Motion.

The *Vice-Chancellor* ordered the Solicitor to pay the Costs.

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Reg. Lib. A. 1823, f. 1770.

(a) 1 Jac. & Walk. 457.

(b) *Ibid.* 674.

SHACKELL v. MACAULAY.

1824.
30th June.

THIS was a Bill for a Discovery, and Commissions to examine Witnesses abroad in aid of a defence to two separate Actions for two separate Libels published by the Plaintiff. The Defendant demurred to the Bill.

Pleading.
Multifariousness.

The Bill stated, that for some years past a Weekly Newspaper has been published called *The John Bull*; that in the latter end of the year 1823 a controversy arose respecting the state and condition of the West India Islands, and the Slave Population there; that the Plaintiff *Shackell* had published, in *The John Bull* Newspaper, (of which the Plaintiffs were Proprietors), divers articles of intelligence, arguments, and observations about that controversy; that the Defendant took an active part in that controversy, on the side opposite to that advocated by *The John Bull* Newspaper; that, on the 26th of October 1823 an Article was published in *The John Bull* Newspaper in the words and figures set forth in the Bill; and that on the 9th of November 1823 another Article was

Demurrer allowed to a Bill for a Discovery, and Commissions to examine Witnesses in aid of the defence to two separate Actions for two separate Libels.

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published by the Plaintiff, in the same Newspaper, in the words and figures also set forth in the Bill.

The Bill averred that the several Witnesses, by whose testimony the Plaintiffs could prove the truth of the Allegations contained in those Articles, had gone abroad, and that after they had gone abroad the Defendant commenced two several Actions at Law against the Plaintiffs in the Court of Kings Bench, and had declared in those Actions; and in the first Count of the Declaration filed in one of them, complained of the whole passage published on the 26th of October, as a false, scandalous, malicious, and defamatory Libel of and concerning him, the said Defendant; and in the 2d, 3d, and 4th Counts, set forth particular parts of the passage, and laid his Damages in that Action at 10,000l.:—That by leave of the Court of King's Bench the Plaintiffs pleaded divers Pleas to this Action, in justification of the several Allegations contained in the passage printed on the 26th of October, and alleged by these Pleas that the several Allegations in the passage were true: That, in the first Count of the Declaration in the other Action the Defendant set forth the whole passage published on the 9th of November, and charged it to be a false, scandalous, malicious, and defamatory Libel concerning him the Defendant; and in the 2d, 3d, 4th, 5th, and 6th Counts, set forth particular parts of the passage, and laid his Damages in this last Action at 10,000l.; and that the Plaintiffs, by leave of the Court of King's Bench, pleaded several Pleas to this last Action in Justification, averring that the Allegations contained in the passage complained of were true.

The Bill then set forth, by way of Charge, all the Averments contained in the Pleas of Justification, and charged that they were true; and alleged that divers

Witnesses, by whom alone the truth of the Pleas could be proved, were abroad on the West Coast of *Africa*, and in the *West Indies*, and concluded with the following Prayer :—

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“ That the said Defendant may make a full discovery of the matters aforesaid, and that one or more Commission or Commissions may issue out of this Court for the examination of Witnesses residing on the West Coast of *Africa*, or in the *West Indies*, or other parts beyond the Seas, out of the jurisdiction of this Court, as to the several matters aforesaid, with all proper and usual directions in that behalf; and that the Plaintiffs may have the benefit of the Testimony of such Witnesses respectively on the trial of the said Actions. And that, in the meantime, the Defendant may be restrained, by the Order and Injunction of this Court, from further proceeding in the said Actions, and each of them, and from all other proceedings at Law against the Plaintiffs or any or either of them, in regard to the matters aforesaid.”

To this Bill the Defendant put in the following Demurrer :—

“ This Defendant, by protestation, &c. and for cause of Demurrer sheweth that the said Complainants have not in and by their said Bill shown any Right or Title to the Discovery, or to the Commission and Injunction, thereby sought ; and for further cause of Demurrer this Defendant sheweth that the Discovery and Commission by the said Bill sought relate to several distinct matters by the said Bill alleged to have been pleaded by the said Complainants to two several and distinct Actions at Law, in the said Bill alleged to have been commenced by this Defendant against the said Complainants, and

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which two several Actions appear by the said Bill to relate to several and distinct matters, and to be founded on several and distinct causes of Action, and such several and distinct Matters so pleaded by the said Complainants to the said two several Actions ought not to have been joined together in one Bill: wherefore, and for other causes apparent, &c."

The Demurrer now came on to be argued.

Mr. *Pepys* and Mr. *Gurratt*, for the Demurrer:—

The first ground on which this Demurrer is to be supported is the same which was relied on in the Case of *Thorpe v. Macaulay* (a). But as the decision in that Case is under appeal, the point is not now insisted upon here.

2d. This Bill is multifarious, inasmuch as it prays Discovery and Commissions to examine Witnesses in aid of a Defence to two separate and distinct Actions at Law. The Bill seeks to have separate Commissions for the examination of Witnesses in two different quarters of the globe, in *Africa*, and in *America*. A Bill of this kind clearly comes within the accurate definition of multifariousness, given in the judgment in *Salvidge v. Hyde* (b). A Commission to examine Witnesses in *Africa*, under this Bill, cannot be to examine them in aid of the Defence to both the Actions. The object of the Bill is to enable the Plaintiff in this Court to go to Trial in two separate Actions. The Commission in aid of the Defence to one of the Actions may be returned in a shorter time than that in aid of the Defence to the other; and the very Witnesses whose depositions may have been read as

(a) 5 Mead. 213.

(b) 5 Mead. 145.

evidence in the first Action, may be in this country at the time of the trial of the last Action, in which their testimony is also to be received. And suppose the Injunction prayed by this Bill were granted, how could it be dissolved as to one of the Actions and continued as to the other? There are matters mixed up in those Actions which are perfectly separate and distinct. Where matters are joined in the same Bill, which require the publication of the depositions of the same Witnesses at one time, and other depositions by them at a subsequent time, it has been decided that the Bill is multifarious. *Dew v. Clarke* (c), is a Case almost directly in point; and in the decision of the present Case the Defendant only asks for the application of the same principle on which the Court then proceeded. The object of the Plaintiff in this Court, in joining both Actions in one Bill, is plainly to delay and embarrass the Defendant. His Answer may be a complete discovery as to all sought in defence of one of the Actions; yet the Bill is so framed as to delay the trial of that Action till the return of the Commission. The Actions at Law are met by separate Pleas, averring the truth of the separate Allegations. If separate Commissions are to issue as to each Action, there can be no reason for mixing up both in the same Bill.

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The *Solicitor General*, Mr. *Sugden*, and Mr. *Wakefield*, for the Bill:—

The question now raised is, whether a person in the situation of this Plaintiff is, as against one and the same Defendant, to be compelled to file two separate Bills? At law different felonies and different torts as between the same parties may be joined in one Indictment or Action. It

(c) *Ante* Vol. I. 108.

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would be a reproach to Courts of Equity if they compelled a Plaintiff to file two separate Bills as to matters which might be joined in one Action at Law. Such a Case as this does not come within the definition of multifariousness, in Lord *Redesdale's* Treatise. He defines it to be (*d*), "to demand by one Bill several matters of different natures against several Defendants." One term of this definition is wanting here: there are not several Defendants, but only one. And even if it be considered that there are several matters included in the same Bill, they are matters of the same nature, and therefore not within the other term of the definition, which extends only to several matters of a different nature. It will be very difficult, if not impossible, to show any Case in which, even where there are distinct matters included in the same Bill, it has been held multifarious, if the parties were the same, or there was only one Defendant. The policy of the Court is against allowing Suits to be split where the object can be attained by one Bill. In *Purefoy v. Purefoy* (*e*), the Court expressed itself very strongly against the splitting of Suits. *Kensington v. White* (*f*), is a Case much stronger than the present. There a Bill was filed by seventy-four Plaintiffs, who were Underwriters, against various Defendants, praying Discovery and Commissions in aid of a Defence to four separate Actions at Law. The Policies in that case were distinct, and made upon different Voyages. But the Court of Exchequer there held that the inconvenience in such cases, where the parties to all the Actions were the same, was greater in compelling the Defendants at Law to split their Case into separate Bills, than in praying for several Commissions in aid of the Defence to separate Actions.

(*d*) Mitf. Pl. 147. 3d edition.

(*e*) 1 Vern. 28.

(*f*) 3 Price, 164.

The whole course of authorities is in favour of such Bills, and it is every day's practice where Underwriters are sued on Policies to file such Bills. Wherever the Actions at Law are of such a nature as that they could be consolidated, one Bill in Equity for Discovery is enough, and such a Bill may be maintained even before the Actions are consolidated. In *Kensington v. White*, four of the Actions had been tried separately. Where there are several Actions at Law by and against the same Parties, of such a nature that there may be the same plea and the same judgment in each, the rule in the Courts of Law is to allow the Actions to be consolidated. *Cecil v. Briggs* (g), *Brown v. Dixon* (h). The authorities and the rules of the Courts of Law on this point are accurately stated in Serjeant *Williams'* note, 2 *Saunders*, 117. It is a mistake to say that the Actions brought by the Defendant in this Case are Actions for Libels. There can be no such Actions. They are both Actions on the Case for Damages in respect of injury alleged to be sustained from the publication of two Paragraphs in the same Newspaper, both relating to the same controversy.

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The VICE-CHANCELLOR:—

This Bill is not framed upon the principle that distinct Commissions should issue as to each Action; but means to include the Defence to both Actions in the same Commission or Commissions. I remember no Case in which this has been before attempted; and it would lead to manifest injustice. Whether the Defendant might or might not have brought one Action in respect of both the alleged Libels is immaterial. He has, in fact, brought two Actions, and is entitled to call upon

(g) 2 T. R. 639. (h) 1 T. R. 274.

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the Plaintiffs in Equity for a separate Defence to each. But if the same Commission is to furnish the Defence for both Actions, then the Plaintiff at Law is necessarily delayed from proceeding in either of the Actions, until the Defendants are prepared for their Defence in both.

But there is still a more important consideration. The depositions taken upon the Commission or Commissions, must be published, and used at the trial of that one of the two Actions which first takes place; though it may happen that the Witnesses in the second Action may come within the jurisdiction before the trial of such second Action takes place: and, if that should not happen, yet the premature publication of this testimony, which is opposed to all the principles of the Court, would be manifestly dangerous to truth and justice, upon the trial of the second Action.

It is said, these inconveniences would be avoided by granting distinct Commissions as to each Action. I have already observed that this Bill is not framed with that view. It is not, however, pretended that any such thing was ever done; but it is said the Court may make a new precedent. At this time of day a Judge would hesitate much before he made a new precedent; because the strong presumption is that a precedent is not to be found, not by reason that it never suited a Plaintiff before to call for it, but because it was not consistent with the principles of the Court.

If a Bill could be, and were framed, so as to put a distinct Case in issue upon each cause of Action, still there would be this injustice to the Defendant, that he must wait for his Costs upon the first Commission until

the return of the second ; and all this novelty is to be introduced for no substantial advantage to the Plaintiff, who would save but little by stating his distinct Cases in the same Bill, instead of stating them in separate Bills.

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SHACKELL
v.
MACAULAY.

The Report of the Case of *Kensington v. White* is too loose to afford any principle ; and under-writing Causes are not to be reasoned upon as furnishing general rules.

Demurrer allowed.

MARSH v. WELLS.

ELIZABETH BAYNARD by her Will gave her Freehold and Leasehold Estates, the latter of which she held under a Lease for twenty-one years from the Dean and Chapter of *Rochester*, to *William Pemble* and *Rachael* his wife, for their lives, and the life of the survivor of them ; and she gave all her Estate, both Freehold and Personal, to *George Marsh*, the Plaintiff's Father, his Heirs, Executors, Administrators and Assigns, and appointed him and the Plaintiff Executors of her Will. The Testatrix died in the year 1797. Upon her decease *William Pemble* entered into the Possession of the Freehold and Leasehold Estates, and continued in such Possession until his decease. In the year 1798, seven years of the Term of twenty-one years being expired, a renewed Lease was, with *Pemble's* consent, taken in the names of the Plaintiff and his Father. In 1800, the Plaintiff's father died, having devised and bequeathed all his real and personal Estate to the Plaintiff, and appointed him his Executor. In the years 1805, 1812, and 1819, renewed Leases were taken, with *Pemble's* consent, in the Plaintiff's name, and the Plaintiff cove-

1824.
30th June.
Waste.
Tenant for Life
and Remainder-
man.

The Rever- sioner of Lease- holds, with the privity of the Tenant for Life, renewed the Lease in his own name, and cove- nanted to repair the Premises. Held that he was to be con- sidered as hav- ing entered into the Covenant on behalf of the Tenant for Life, and that the lat- ter's Estate was liable for Dila- pidations occa- sioned by his neglecting to repair.

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nanted to keep the Buildings and Fences on the Premises in Repair. Upon every renewal, *Pemble* and the Plaintiff paid the Fine, in certain proportions agreed upon between them. In 1823 *Pemble* died intestate: the Defendants were his Administrators.

Some years before his decease the Plaintiff had informed him, by letter, that he expected the Freehold Estate to be kept in proper tenantable Repair, and requested him to consider that Communication as due notice thereof. *Pemble's* Solicitor answered this letter, and said that *Pemble* accepted it as legal Notice respecting the Repairs of the Freehold Estate, and would give due attention to it; but, notwithstanding, both the Freehold and Leasehold Estates were, at *Pemble's* decease, in a dilapidated state. In consequence of this, a meeting took place between the Plaintiff and the Defendants, at which a Surveyor was appointed on each side to ascertain the Expense of making the necessary Repairs, with power to them to appoint an Umpire. The Surveyors accordingly appointed an Umpire, but, before any Survey was made, the Defendants revoked the authority given to their Surveyor and the Umpire, upon which the Plaintiff's Surveyor and the Umpire proceeded to survey the Buildings and Fences, and estimated the Expense of the Repairs at 630*l.* 10*s.* and made a report to that effect.

The Bill, after stating as above, prayed that it might be declared, that the Plaintiff was entitled to a Compensation out of *Pemble's* Personal Estate, for the Repairs which *Pemble* ought to have done upon the Freehold and Leasehold Estates, and that it might be referred to the *Master* to inquire and state what Sums would be necessary for putting the Estates into a tenantable and proper state

of Repair, and that such Sums might be ordered to be paid to the Plaintiff out of *Pemle's* Personal Estate.

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To this Bill the Defendants put in a general Demurrer for want of Equity.

Mr. Koe in support of the Demurrer:—

This is not like the case of a Tenant for Life benefiting himself by the Commission of Waste, as by cutting Timber. This is a mere Case of Permissive Waste. There are many Cases that show that the Executors of a person who has been guilty of Permissive Waste are not liable. *Gibson v. Wells (a)*, *Herne v. Bembow (b)*, *Turner v. Buck (c)*, *Lansdowne v. Lansdowne (d)*. It was optional on the part of the Plaintiff to take the renewed Leases. He could not have compelled the Tenant for Life to take them: but he considered the renewing of the Leases to be for his own benefit.

Mr. Sugden and Mr. Wilbraham in support of the Bill:—

The Plaintiff in this Case was, during the life of the Tenant for Life, a Trustee only. The Rents were received by the Tenant for Life. The Plaintiff, upon taking the Renewals, entered into onerous Covenants to perform certain Obligations, not for the benefit of himself alone, but for the benefit and with the privity of the Tenant for Life. Those Covenants were broken during the possession of the Tenant for Life. Then ought not his Estate to defray part of the Damages? Suppose that, instead of having a partial interest, he had been entitled to this Property absolutely, and the Plaintiff had entered into the Covenants, he must have indemnified the Plaintiff

(a) 1 New Rep. 290.

(b) 4 Taunt. 764; see also *Jones v. Hill*, 7 Taunt. 392.

(c) 22 Vin. Ab. 523.

(d) 1 J. & W. 522.

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for any Damage sustained by breach of the Covenants, before he could call for an Assignment. What difference can it make in this respect, whether he is entitled to the entire or the absolute Interest in the Property? The Covenants were entered into by the Plaintiff as a Trustee; and, as it was done with the privity and consent of the Tenant for Life, they were in equity his Covenants, and might have been enforced against him. The Case of *Turner v. Buck* was decided upon the ground that the Jointress had entered into no Covenant to repair; here there was such a Covenant.

This Bill charges that the Defendants did acquiesce in the Plaintiff's demand, and appointed a Surveyor to meet the one appointed by the Plaintiff, and that they had a meeting, but that the Defendants afterwards revoked their appointment. This part of the Case calls for an answer; and the Demurrer must be over-ruled upon this as well as upon the grounds before stated.

The VICE-CHANCELLOR:—

The Plaintiff, during the life of *W. Pemble*, was, in effect, the Trustee of these Premises for *W. Pemble*, and was so constituted by his consent. The Covenant of the Defendant to keep the Premises in Repair is, during the life of *W. Pemble*, to be considered as entered into by the Plaintiff on the behalf and at the request of *W. Pemble*; and the Plaintiff is plainly therefore entitled to be indemnified out of the Assets of *W. Pemble* for *W. Pemble's* breach of that Covenant. It can make no difference in this principle, that the Plaintiff upon the death of *W. Pemble* became entitled to the beneficial Interest in the remainder of the Lease.

Demurrer over-ruled.

WELD v. BONHAM.

THE Bill was filed by *Weld* and *Louther*, on behalf of themselves and all other the joint and separate Creditors of *Bell* and *Wilkinson*, against *Bonham*, *Barclay* and *Rowcroft*, who were Trustees for Payment of *Bell* and *Wilkinson's* Debts, and against *Bell* and *Wilkinson* themselves.

It stated that in 1819 *Wilkinson* became indebted to the Plaintiffs, who were then in Partnership as Tailors, on his separate account, in 123*l*, for goods sold and delivered: That *Wilkinson* and *Bell* were then in Partnership as Merchants and Ship Owners: That they afterwards became insolvent: That a Deed dated the 27th of June 1820, was made between *Bell* and *Wilkinson* of the 1st part, one *Adam Bell* of the 2d part, the persons whose Names were subscribed and Seals affixed, (being Creditors of *Bell* and *Wilkinson*) of the 3d part, and *Bonham*, *Barclay* and *Rowcroft*, of the 4th part; by which *Bell* and *Wilkinson* covenanted with *Bonham*, *Barclay* and *Rowcroft* to do all necessary acts for vesting their joint and separate Estates in *Bonham*, *Barclay* and *Rowcroft*, and to enable them to convert such Estates into Money; and it was thereby covenanted, between all the Parties to the Deed, that *Bonham*, *Barclay* and *Rowcroft* should stand possessed of the Monies which they should receive by such conversion, upon trust to distribute the same amongst the joint and separate Creditors, in such shares, order and course of priority as they, with reference to the nature and amount of the claims and securities of the Creditors, should think proper. The

1824.
30th June.

Pleading.
Parties.

A Bill to carry the Trusts of a Creditor's Deed into execution, may be filed on behalf of all the Creditors by one of them only, where they all executed the Deed but were very numerous.

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Bill further stated that, in pursuance of the Trusts of this Deed, the Trustees had taken possession of the joint and separate Estate, but had not applied it according to the Trusts, but had paid it over to *Bell* and *Wilkinson*, and had thereby been guilty of a breach of trust. It prayed for an Account of the joint and separate Estates possessed by the Trustees; that they might be held personally responsible for such parts as they had paid over to *Bell* and *Wilkinson*; and that the Estates of *Bell* and *Wilkinson* might be applied, in pursuance of the Trusts of the Deed, in payment of the Debts due to the Plaintiffs and the other joint and separate Creditors.

The Defendants *Bonham* and *Barclay* demurred to the Bill, because the persons who were parties to the Deed of the 3d part were not made Defendants to it.

Mr. *Tinney*, in support of the Demurrer, said that all the Creditors were not made parties to the Bill, although they were scheduled Creditors, and parties to the Deed; and that no reason was stated for the omission. He admitted that the Bill was filed by the Plaintiffs on behalf of all the Creditors; but he said that some of them were joint and others separate Creditors; and that one at least of each class ought to have been brought before the Court, and he cited *Cockburn v. Thompson* (a).

Mr. *Lynch* supported the Bill; and, in answer to a question put by the *Vice-Chancellor*, said that there was no allegation in the Bill that the Creditors were numerous, but that they appeared to be so by the Deed.

(a) 16 Ves. 321. See also *Meux v. Maltby*. 2 Swans. 277. *Weale v. West Middx. Waterworks Compy*. 1. J. & W. 358. and *Baldwin v. Lawrence*, ante.

The VICE-CHANCELLOR :—

I am of opinion that it was not necessary to make a joint Creditor of *A.* and *B.*, or a separate Creditor of *A.* a party to this Suit, and that the Plaintiff being a separate Creditor of *B.* is entitled to represent all who claim under this Deed, although they do not all claim in the same order. If there be special circumstances in this Case which make it fit that the joint Creditors of *A.* and *B.*, or the separate Creditors of *A.*, should be more distinctly represented in taking the Accounts before the *Master*, a proper application must be made to the Court for that purpose after the Decree. With respect to the objection that the Plaintiff has not alleged that the Parties to the Deed are numerous, the Court being, from the statement of the Deed in the Bill, virtually in the possession of the Deed and its Schedule, sees for itself that the Parties are much too numerous to make it practicable to prosecute a Suit, if they are all made Parties.

1824.

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ATTORNEY GENERAL v. COMBER.

JOSEPH COMBER by his Will bequeathed as follows:—

“ Whatsoever there may be from the Property now in Chancery belonging to the late *Cleophus Comber*, my Father, now to me, one fourth to my Uncle *William Kelsey*, one fourth to the Widows and Orphans of the Parish of *Lindfield, Sussex*, the remaining half to my Uncle *Charles Comber*.”

1824.
1 & 3 July.
Charity.

Bequest to the Widows and Orphans of the Parish of *L.* held a good Charitable Bequest.

The Information in this Case prayed that it might be declared that this Bequest to the Widows and Orphans

1824.
 ATTORNEY
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 v.
 COMBER.

of the Parish of *Lindfield*, was a valid Bequest to a Charitable Use. It appeared that the amount of the Property was likely to be so very small that, if the Charitable Bequest were held to be good, it could not be enough to form a permanent Fund, but must be the subject of immediate distribution.

Mr. *Hart* and Mr. *Cooper*, for the Information, cited *Attorney General v. Peacock* (a), *Attorney General v. Clark* (b), *West v. Knight* (c).

Mr. *Horne*, Mr. *Sugden*, and Mr. *Ching*, for the Defendant, insisted that it was not a personal Gift to the Widows and Orphans, and that the description of the persons was too general and uncertain.

The VICE-CHANCELLOR :—

A Gift to the Widows and Orphans of the Parish of *Lindfield*, could not in its nature have proceeded from motives of personal bounty to particular individuals ; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence. I must act upon this Bequest, as if the expression had been to the *Poor Widows and Orphans of Lindfield*. Declare this to be a Charitable Use.

This Court doth declare that the specific Bequest of the fourth part of the Property, mentioned in the Testator's Will, to the Widows and Orphans of the Parish of

(a) Finch. 245. (b) Amb. 422. (c) 1 Cha. Ca. 134.

Lindfield, Sussex, is a good Charitable Bequest, and doth order and decree that it be referred to Mr. *Dowdeswell*, one of the *Masters* of this Court, to inquire of what such Property consisted, and to take an Account of such part thereof as hath come to the hands of the Defendant *Comber*, or any person or persons by his order, or for his use, and to ascertain the Value thereof; and in order there- to the Parties are to produce before the said *Master*, upon oath, all Books, &c. And it is ordered, that the said *Master* do appoint proper persons, belonging to the Parish of *Lindfield*, to be the Trustees of the Charity Fund. Further Directions and Costs reserved.

Reg. Lib. A. 1823. f. 1651.

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NEWSOME v. SHEARMAN.

BY the Decree on further directions, it was ordered that the *Master* should tax the Defendant his Costs, and that the Defendant should retain them out of the Balance certified by the *Master* to be in his hands, and pay the Residue into the Bank to the credit of the Cause. Under this Decree the Defendant had been twice served with a Warrant to bring in his Costs to be taxed, but without effect.

Mr. *Roupell*, for the Plaintiff, now moved that the Defendant might be ordered to pay the whole of the Balance into the Bank. But the *Vice-Chancellor* refused the Motion, saying that it sought to alter the Decree made upon further directions, and that the proper course was, to move that the Defendant might, within a limited time, bring in his Bill of Costs to be taxed.

1824.
2d July.

Practice.

Where a Decree orders the Defendant to retain his Costs, when taxed, out of the Balance in his hands, and pay the Residue into Court, if the Defendant delay to get his Costs taxed, the Plaintiff must move that he may bring in his Bill of Costs to be taxed within a limited time, and not that he may pay in the whole balance.

FAIRFIELD v. WESTON.

1824.
5th July.

Timber.

Whether the Grantor of an Annuity, charged upon the Rents and Profits of an Estate, with the usual demise to a Trustee, has a right to cut Timber for his own use and Profit, the Estate being inadequate to the payment of the Charges upon it.—*Qu.*

THE Plaintiff was entitled to an Annuity granted to him by the Defendant *Weston*, and charged upon certain Estates, part of which was described as Woodland, of which *Weston* was Tenant for Life, unimpeachable of waste, and further secured by a demise of the Estate to a Trustee for a term of Years. The Bill was filed against *Weston* and the other Incumbrancers on the Estate, whose charges were subsequent to the Plaintiff's. After an Order obtained by the Plaintiff for the appointment of a Receiver, the Defendant *Weston*, who was abroad, through the intervention of an Agent, sold some Timber standing upon the Estate, to *George Marshall*, who proceeded to cut it. A supplemental Bill was filed against *Marshall* for an Injunction to restrain him from carrying off the Timber already cut, and from cutting any more Timber. It appeared that the yearly amount of the various Incumbrances on the Estate considerably exceeded the yearly Rents and Profits. A Motion was now made for the Injunction, and also for a reference to the *Master*, to inquire whether it was for the benefit of the Incumbrancers that the Contract with *Marshall* should be performed; and, if the Master should be of opinion that the Contract should be performed, then that *Marshall* might proceed in the cutting of Timber according to his Contract, on his undertaking to pay the Price into Court to the credit of the Cause.

Mr. *Ching* for the Motion.

Mr. *Sugden* and Mr. *Witham*, for the Defendant *Weston*, insisted that the Rents and Profits upon which the Annuity was charged did not include the Profits of the

Timber, and the right to cut and sell Timber remained in the Defendant *Weston*.

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Mr. *Merivale*, Mr. *Parker*, Mr. *Lynch*, and Mr. *Richards*, for the other Parties.

The Cases cited as to the right to cut Timber, were *Bray v. Tracy* (a), *Newdigate's Case* (b), *Gill v. Pindon* (c), *Comyns's Digest* (d), *Davis v. Duke of Marlborough* (e).

The VICE-CHANCELLOR:—

The question is not whether the Annuitant or the Trustee of his Term has a right to cut Timber; but whether, the Timber being cut by the Grantor, the Annuitant has, or not, a right to be paid out of the price, as a part of the Profit of the Estate charged with the Annuity. The Trustee not being unimpeachable of Waste clearly cannot, as a Termor, cut the Timber. I rather apprehend that the general charge of the Annuity upon the Rents and Profits of the Estate would include the Profits of Timber, unless the word Profits is upon the whole Deed, having reference to the uses of the Term, to receive here a more limited sense. But this is not the proper season to enter more fully into this question.

The Receiver is, as between the parties to the Suit, to be considered as appointed from the date of the Order of Reference to the *Master*; and after the date of that Order the Defendant *Weston* was not at liberty to exer-

(a) Sir W. Jones, 51. (b) Moor, 72. (c) Cary, 90.
(d) Waste (C. 5.) (e) 2 Swan. 131.

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 WESTON.

cise any right of ownership upon the Estate, without the authority of the Court. The interest of the Incumbrancers requires that *Marshall* should be at liberty to proceed in the cutting of the Timber: but I will secure the Price in order that the right to the Value may be decided upon the hearing of the supplemental Suit.

By an arrangement between the Parties *Marshall* undertook to pay the Price of the Timber into Court.

" All Parties by their Counsel waiving the inquiry whether the Contract for the sale of Timber, entered into by the Defendant *J. W. Weston*, by his Agent, and in the Pleadings mentioned, is a fair Contract, and such as ought to be carried into effect, this Court doth order that the Defendant, *George Marshall* be at liberty to remove the rest of the Oak Timber trees felled and now remaining in and upon the Estate and Premises in the Pleadings mentioned, with the bark, lops, and tops thereof; and it is ordered that the said *George Marshall* do pay the Amount of the valuation of the Timber, in the Pleadings mentioned, making the deduction allowed by the Contract in case of payment before the 29th of September next, the Residue of such Amount to be verified by affidavit, into the Bank, with the privity of the *Accountant General* in trust in this Cause, &c."

Reg. Lib. A. 1823. f. 1542.

NOEL v. LORD WALSINGHAM.

BY the Marriage Settlement of *Paul Cobb Methuen*, Esq. the Father of the Plaintiff *Mrs. Noel*, dated in April 1776, certain Manors and other Hereditaments in the Counties of *Wilts, Gloucester* and *Somerset*, were conveyed to the use of *Paul Cobb Methuen* during his natural life, with remainder to the use of Trustees to preserve contingent remainders, with remainder to the use of certain other Trustees, for the Term of five hundred years, and, subject thereto, to the use of the first and other Sons of the Marriage successively in tail male, with divers remainders over. The Trusts of the Term of five hundred years were, in case there should be two or more Children of the Marriage other than an eldest or only Son, to raise the Sum of 15,000*l.* for their Portions, in such Shares and Proportions as *Paul Cobb Methuen* should, by any Writing under his hand and seal, or by his last Will and Testament, or any Codicil thereto, appoint, and, in default of such appointment, to be equally divided amongst them; the Shares to become vested at the usual periods, but not to be payable until six months after the decease of *Paul Cobb Methuen*, and then to be paid with Interest from his death after the rate of four per cent. per annum, and not sooner, unless *Paul Cobb Methuen* should by writing under his hand direct such Portions, or any part thereof, to be raised and paid in his lifetime. Provided that, if *Paul Cobb Methuen* should in his lifetime give or advance unto or for any Child or Children of the Marriage entitled to Portions under the Trusts of the Term of five hundred years, any sum or sums of Money, Lands, Tenements, Goods or Chattels for or towards the advance-

1824.
5th July.

Portions.
Satisfaction.

A Father being Tenant for Life under his Marriage Settlement, with power to appoint the Shares in which his younger Children were to take a Sum to be raised for their Portions, having exercised the power by his Will, afterwards made a provision for one of his Daughters, took a Release from her of her Portion, and by a Codicil revoked the appointment in his Will, so far as it respected her. Held that her Share did not sink into the Freehold, or belong to his Residuary Legatee, but that the other younger Children were entitled to the whole Fund.

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ment and preferment of such Child or Children respectively in Marriage, or otherwise, then such sum and sums of Money, and the value of such Lands, Tenements, Goods and Chattels, should be, and be deemed, accounted and taken as and for part, if less, and, if as much or more, for the whole of the Portions and Provisions before provided and appointed to be raised to and for him, her or them respectively, unless *Paul Cobb Methuen* should by writing under his hand signify and declare the contrary.

There was issue of the Marriage four Sons and five Daughters; (that is to say), the Defendant *Paul Methuen* the eldest Son, *Charles Lucas Methuen*, *John Andrew Methuen*, *Matilda Lady Walsingham*, *Catherine Matilda Plumtree*, the Rev. *Thomas Anthony Methuen*, the Plaintiff *Cecilia Penelope Noel*, *Gertrude Grace O'Bryen* and *Ann Christian Methuen*.

Paul Methuen, the Father of *Paul Cobb Methuen*, by his Will dated the 10th of April 1793, devised certain Manors and Hereditaments to Trustees, upon trust, upon the request of *Paul Cobb Methuen*, to sell and dispose thereof, and upon the receipt of the Purchase Money, to pay the sum of 20,000*l.* amongst the younger Sons of *Paul Cobb Methuen*, in case they should attain the age of twenty-one years, in such Shares as *Paul Cobb Methuen* should think fitting; and he thereby declared that the 20,000*l.* when so paid to such younger Sons, should be accepted by them in full satisfaction of their Shares of the sum of 15,000*l.* provided for the Portions of the younger Children of *Paul Cobb Methuen* by his Marriage Settlement, and that the 15,000*l.* should then be left to be shared amongst his remaining younger Children.

In 1795 the Testator died.

Previous to the Marriage of Lord and Lady *Walsingham*, *Paul Cobb Methuen*, by an Indenture dated the 12th of May 1804, appointed that the sum of 3,000*l.* should be *Lady Walsingham's* Share of the 15,000*l.*

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WALSINGHAM.

By a Deed-poll, dated the 17th of May 1804, and executed by Lord and Lady *Walsingham* and *Paul Cobb Methuen*, in consideration of certain sums of Money having been advanced and paid, or secured to be paid, by *Paul Cobb Methuen* on Lady *Walsingham's* Marriage, to her Husband and the Trustees of her Marriage Settlement, the sum of 3,000*l.* so appointed in favour of Lady *Walsingham*, and all Interest she or her Husband might claim in respect thereof, was assigned to *Paul Cobb Methuen*, his Executors, Administrators and Assigns, absolutely.

Ann Christian Methuen died intestate in the lifetime of her Father, having previously attained the age of twenty-one years; and the Defendant *Paul Methuen*, after his Father's decease, took out Letters of Administration to her Estate.

Paul Cobb Methuen, by his Will dated the 12th of October 1809, directed the Estates and Hereditaments out of which the 20,000*l.* was to be raised, to be sold, and the Trustees to stand possessed of the Purchase Money upon trust, as to the sum of 1,000*l.* part thereof, for his second Son *Thomas Anthony Methuen*, his Executors, Administrators and Assigns, to be paid immediately after his decease; and, as to the sum of 9,000*l.*, in trust for his third Son *Charles Lucas Methuen*; and, as to the sum of 10,000*l.*, in trust for his youngest Son *John Andrew Methuen*. And he thereby directed, in further pursuance

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of the Will of *Paul Methuen*, that the 15,000*l.* by his Marriage Settlement directed to be raised and paid unto his younger Children, should be paid to his Daughters only, except Lady *Walsingham* (and to whom on her Marriage he had paid the sum of 7,000*l.* in lieu of any Share she might have been entitled to of the sum of 15,000*l.*) in equal Shares and Proportions, and in such manner as the same was directed to be paid to his younger Children by his Settlement.

By a Deed-poll dated the 15th of June 1813, *Thomas Anthony Methuen*, in consideration of a sum of Money advanced and secured to him by *Paul Cobb Methuen*, released unto *Paul Cobb Methuen* and his Heirs all his Right, Title and Interest in and to the Manors and other Hereditaments comprised in the Settlement and Will of *Paul Methuen*, and charged with the payment of his Portion as one of the younger Children of *Paul Cobb Methuen*.

By a Deed-poll dated the 31st of March 1815, *Gertrude Grace Methuen*, afterwards Lady *Edward O'Brien*, in consideration of 10,000*l.* secured for her by *Paul Cobb Methuen*, released to *Paul Cobb Methuen* and his Heirs all her Right, Title and Interest in or to the Manors and Hereditaments comprised in the Settlement charged with the payment of her Portion as one of the younger Children of *Paul Cobb Methuen*; so that neither she, her Heirs, Executors, Administrators or Assigns, nor any other person or persons in trust for her or them, or in her or their name or names, or in the name, right or stead of her or any of them, might, by virtue of such Indentures, or by any other ways or means whatsoever, thereafter have or demand any Right, Title or Interest of, in, to

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or out of the same Manors, Messuages, Lands or Hereditaments in respect of her Share or Proportion of such sum or sums of Money so directed to be raised for such provision as aforesaid, but that she, her Heirs, Executors, Administrators or Assigns, and every of them, and all and every person or persons whomsoever claiming by, from, through or under her or them; from all Estate, Right, Title, Property, Claim or Demand, of, in, to or out of the same Manors, Messuages, Lands, Hereditaments and Premises, or any of them, or any part thereof, should be thereby for ever excluded and debarred.

Paul Cobb Methuen made a Codicil to his Will; dated the 1st of April 1815; and, after reciting his Will, and an Indenture, whereby, in contemplation of the then intended Marriage between his Daughter *Gertrude Grace* with Lord *Edward O'Bryen*, 10,000*l.* had been paid to her, or for her benefit, as a Marriage Portion, he, in consideration of such provision so made for his Daughter *Gertrude Grace*, did thereby revoke, annul and make void the direction and appointment so by him before made in and by his Will or otherwise, with respect to the sum of 15,000*l.* so far only as respected his Daughter *Gertrude Grace* and her Share or Proportion of the same respectively, but not further or otherwise with respect to his other Daughters, except Lady *Walsingham*.

Paul Cobb Methuen died sometime in the year 1816; and, after his decease, Administration, with his Will and Codicil annexed, was granted to the Defendant *Paul Methuen*, his eldest Son, and residuary Legatee.

Mrs. *Noel* and Mrs. *Plumtree* married after their Father's death.

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The Bill charged that, under the circumstances before stated, the Plaintiff, Mrs. *Noel*, became entitled to share with her sister Mrs. *Plumptree*, in the whole of the 15,000*l.*, together with Interest after the rate of four per cent. per annum from the decease of *Paul Cobb Methuen*, in equal Moieties: And it prayed that the Trustees of the term of five hundred years might be directed to raise the 15,000*l.* in pursuance of the Trusts of the Settlement; and that Mrs. *Noel* might be decreed to be entitled to a Moiety of that Sum, with Interest after the rate of four per cent. from her Father's decease.

The Defendant *Paul Methuen*, by his Answer, submitted that Mrs. *Noel* was not entitled to share with Mrs. *Plumptree* in the 15,000*l.*, in equal Moieties, for that *Thomas Anthony Methuen*, not having received an adequate or reasonable Share with his other younger Brothers out of the 20,000*l.* nor having made any election to accept that provision in lieu of the provision made for him by the Settlement, was entitled to share with his four Sisters in the 12,000*l.*, being so much of the 15,000*l.* as remained after the appointment of the 3,000*l.* to Lady *Walsingham*; and that, being so entitled, *Thomas Anthony Methuen*, in consideration of a sum of Money advanced to him by *Paul Cobb Methuen*, by the Deed-poll of the 15th day of June 1813, assigned to *Paul Cobb Methuen* all his Right and Interest both in the 20,000*l.* and 15,000*l.*, and that thereupon the same fell into and formed part of *Paul Cobb Methuen*'s residuary personal Estate, and then belonged to him the Defendant *Paul Methuen* as *Paul Cobb Methuen*'s Executor and residuary Legatee. And he insisted that, in consequence of the Release or Assignment made by Lady *Edward O'Bryen* to *Paul Cobb Methuen*, and also of the revocation contained in the Codicil as to her Share, Mrs. *Noel* and Mrs. *Plumptree*

became entitled to Two-thirds only of the 3,000*l.* in equal Shares, and that the remaining Third, in consequence of the revocation contained in the Codicil, fell into the residue of the Testator's personal Estate; and that, as to the Sum of 12,000*l.*, Two-thirds thereof, after deducting 2,400*l.*, the Share of *Thomas Anthony Methuen*, were divisible between Mrs. *Noel* and Mrs. *Plumptree* in equal Shares; and that, of the remaining 3,200*l.*, 2,400*l.* being the amount of the original Share of Lady *Edward O'Bryen*, by virtue of the Release or Assignment became the property of the Testator, and fell into the residue of his personal Estate, to which he the Defendant *Paul Methuen* was entitled as aforesaid; and that 800*l.*, the remainder of the 12,000*l.*, being left altogether unappointed, became divisible between the personal Representative of *Paul Cobb Methuen*, as the Assignee of *Thomas Anthony Methuen*, Mrs. *Plumptree*, Mrs. *Noel* and the personal Representative of *Ann Christian Methuen*, in equal Shares.

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The Defendants *Charles Lucas Methuen* and *John Andrew Methuen* by their Answer said that, in consequence of the appointment made to them by *Paul Cobb Methuen*, of the sums of 9,000*l.* and 10,000*l.* out of the 20,000*l.* bequeathed by the Will of *Paul Methuen*, and which they had agreed to accept in lieu of their Share in the provision made for them by the Settlement, they claimed no Right or Interest in or to the 15,000*l.*

The Defendant *Paul Mildmay Methuen* was the eldest Son of the Defendant *Paul Methuen*, and as such was entitled to the first Estate of inheritance in the premises. He, by his Answer, insisted that by virtue of the two Deeds-poll or Releases made by *Thomas Anthony Methuen*

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and Lady *Edward O'Bryen*, their Shares in the 15,000*l.* were released to *Paul Cobb Methuen*, as the Owner of the Freehold of the Hereditaments out of which that Sum was to be raised; and that therefore those Shares became wholly extinguished.

Mr. *Horne* and Mr. *Inman* for the Plaintiffs.

Mr. *Sugden* and Mr. *Spurrier* for the Defendant
Paul Methuen:—

The Release taken from Lady *Walsingham* was, in effect, an Assignment, though it certainly does contain words of Release (a). But it has all the operation of an Assignment; and there would be no difficulty in this Case but for the decision in *Folkes v. Western* (b). According to the authority of that Case, *Paul Cobb Methuen* was incapable of purchasing, by advancement to his Daughter, any Share in the Fund. The course frequently adopted upon the marriages of the younger members of a family, for whom Portions are provided under their Parent's Settlement, is this; the Father advances the amount of the Portion and takes an Assignment of the Portion itself. If *Folkes v. Western* were carried to its full extent, it would prevent a Father from advancing a Child his Portion. But that case is not Law; and, so far as regards the Argument on the uncertainty of the Share, the decision is clearly founded in error. The Child there had a vested interest in the Fund, subject only to the power of appointment. What

(a) The Deed, as stated in the Brief, was an Assignment only.

(b) 9 Ves. 456. See Mr. *Sugden*'s observations upon this Case in his *Treatise of Powers*, p. 561, 3d ed.

the Court would hold in such a case would probably be, that the Share of the Child bargained for by the Father, is the vested Share of the Child, subject to the appointment. The Case of *Pitt v. Jackson*, or *Smith v. Lord Camelford*(c), is directly contrary to *Folkes v. Western*. Besides, that Case differs from this in the following points: There the Daughter's Share was undefined; here it is defined by the appointment of the 12th of May 1804: There the Father took no Assignment of his Daughter's Portion, so that it remained for the Court to say whether the advancement was or was not a satisfaction of the Portion; here the Father took an actual Assignment of Lady *Walsingham's* Portion, and thereby secured to himself the benefit of it.

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In this view of the Case there still remained 12,000*l.* of the original fund to be divided amongst the Daughters. By his Will he disposes of that Sum, and of the 3,000*l.* which he had bought of Lady *Walsingham*(d).

In June 1813, *Thomas Anthony Methuen* released all his Right, Title and Interest in the Hereditaments charged with his Portion to *Paul Cobb Methuen* and his Heirs. The word "Heirs" is used here incorrectly. For the Heirs of this gentleman never could have any claim to this Portion. But the Son meant by this re-

(c) 2 Bro. C. C. 51. and 2 Ves. Jun. 698.

(d) Does it not appear from *Paul Cobb Methuen* not keeping these Sums distinct in his Will, but mentioning them as one entire sum of 15,000*l.* by his *Marriage Settlement* provided and directed to be raised and paid amongst his younger Children, that he did not consider himself as the Purchaser of the 3,000*l.*?

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lease to give effect to the disposition made by his Father's Will.

The Testator next makes a Provision for Lady *Edward O'Bryen*, and takes a release from her of her Portion under the Settlement. He then, by his Codicil, revokes the appointment made by his Will, so far as it respected her. This revocation has the effect, either of giving that Lady's share of the 15,000*l.* under the Will to her two other Sisters, Mrs. *Noel* and Mrs. *Plumptree*, or of wholly withdrawing it from the operation of the Will. It is impossible to support the former of these propositions; for there are no words of Gift in the Codicil. The latter of them is therefore to be maintained; and the consequence is that Mr. *Paul Methuen* is entitled to the 5,000*l.* as undisposed of.

If the Will and Codicil were to be wholly disregarded Mr. *Paul Methuen* would be entitled to 6,000*l.* of the 15,000*l.*; for he would be entitled to one sum of 3,000*l.* as the Purchaser of Lady *Walsingham's* Share, and to another sum of the same amount, as the Purchaser of Lady *Edward O'Bryen's* Share. So that the least that he can be entitled to, in any view of the case, is 5,000*l.*

At all events, if these Instruments are considered to operate as releases only of these Portions, Mr. *Paul Methuen* is entitled to the benefit of them as Tenant for Life of the Estates on which the Portions were charged.

Sir *Giffin Wilson* and Mr. *Knight* for *Paul Mildmay Methuen* :—

It is provided by the Settlement that if the Father should, in his lifetime, advance any of the Children en-

titled to Portions under it, such advancement should be considered as a satisfaction of that Child's Portion, unless the Father should declare the contrary in writing. Under that proviso, an advancement at once extinguishes the Share of the advanced Child, unless a Declaration is made to the contrary.

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If, therefore, *Paul Cobb Methuen* did not mean Lady *Walsingham's* Share to sink into the Freehold, he ought to have declared so, and not to have taken an Assignment of it from her.

Supposing, however, that the Assignment is considered as tantamount to such a Declaration, then the question is whether Lady *Edward O'Bryen's* 5,000*l.* or any part of it, is to be raised. There is a marked distinction between the conduct of the Father on Lady *Walsingham's* Marriage and on Lady *Edward O'Bryen's*. On the former he makes an appointment of a Share and takes an Assignment of that Share. On the latter he neither makes an Appointment nor an Assignment, but simply takes a Release, as having an interest in the Estate as Tenant for life. If he intended to give, by the Codicil, Lady *Edward O'Bryen's* Share to his two other Daughters, he could not do so, because it had been extinguished by the Release. But he had no such intention. For if he had so intended he knew how to declare so, and would have done it, and not have simply revoked the appointment in her favour. We, therefore, contend that 5,000*l.* of the 15,000*l.* was extinguished.

Mr. *Roupell*, Mr. *Miller*, Mr. *Christie* and Mr. *Blunt*, appeared for the other Defendants.

The VICE-CHANCELLOR :—

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Mr. *Paul Cobb Methuen* became the Purchaser of the 3,000*l.* which he had appointed to Lady *Walsingham*; and that Sum, not being more than her equal aliquot share of the 15,000*l.*, it might be difficult to question the validity of that Appointment or Purchase, if the interest of any party required it; which does not happen to be the case. By the death of the Daughter *Ann Christian*, intestate, after she had attained twenty-one, Mr. *Paul Cobb Methuen* being entitled to administer to her, his Executor could now have claimed her share in any part of the 15,000*l.* which, if unappointed, would have devolved upon her representative. Mr. *Paul Cobb Methuen* could not have appointed any Share after her death to her representative, if he had not been entitled to fill that character himself. When Mr. *Paul Cobb Methuen* made his Will in October 1809, he had full power to give the 15,000*l.* to his other Daughters in exclusion of Lady *Walsingham*.

The only questions in the Cause appear to me to arise upon the subsequent transactions with respect to Lady *Edward O Bryen's* Portion.

By the terms of the Settlement any advance made by the Father in his lifetime was to be taken in or towards satisfaction of the Portion provided by the Settlement for a younger Child, unless the Father should declare the contrary. I apprehend the true construction of this provision is that, if the Father make an advance to an object of the Settlement, without any declaration of intention in respect to it, the advance operates to the exoneration of the Estate charged with the Portion: but that the Father is at liberty to declare that the Child advanced shall, notwithstanding, receive its full Portion; or is at liberty to

consider himself, *pro tanto*, the Purchaser of the Portion, and to declare, in effect, that it shall remain a charge upon the Estate for his benefit. The question, then, with the settled Estate is, whether Mr. *Paul Cobb Methuen* has declared any intention that, notwithstanding the advance made to Lady *Edward O'Bryen*, her share of the 15,000*l.* should continue a charge upon the settled Estate, in order to remain at his disposition? I concur with the argument for the personal representative of Mr. *Paul Cobb Methuen*, that the Deed-poll of Lord and Lady *Edward O'Bryen* of the 31st March 1815, may, under the circumstances, be treated as an assignment of her interest in the 15,000*l.* to her Father; and I take the true intent and effect of his Codicil to be, not to leave one-third of the 15,000*l.* unappointed; but, as his Will had given the 15,000*l.* equally between his Daughters except Lady *Walsingham*, that the intention of the Codicil was further to except Lady *Edward O'Bryen*, and to give the 15,000*l.* equally between the two other Daughters, and the declaration of my Decree will be accordingly.

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I may add that, having carefully considered the Case of *Folkes* and *Western*, I do not concur in the observation made at the Bar, that there is error in that Decree; inasmuch as it was not declared that the Father was a Purchaser of Mrs. *Lloyd's* Share. There was, in that case, no expressed intention on the part of the Father to that effect. I have more difficulty as to that part of the Decree which declares that Mrs. *Western*, the Mother, had lost her power of appointment. The Settlement gave her, in the event which happened of her surviving her Husband, a power to appoint the whole Fund to any one Child; and the act of the Husband in providing a satisfaction for one Child could not, I think, deprive the Widow of her

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power to appoint the whole Fund to the only other Child. And such appointment appears to me to have been necessary in order to enable the only other Child to take the whole Fund; for, there being in fact no appointment either by Husband or Wife in favour of any Child, the consequence should seem to be, under the Settlement, that Mrs. *Strickland*, the unprovided Child, could take only a Moiety of the unprovided Fund, and that the other Moiety, which by the terms of the Settlement would vest in Mrs. *Lloyd*, the provided Child, would sink for the benefit of the Estate charged, if, as I think, the Father could not be considered as a Purchaser, but would otherwise be a part of the personal Estate of the Father. The Case of *Boyle v. the Bishop of Peterborough* (c) bears strongly upon this view of the Case.

(c) 1 Ves. jun. 299; and 3 Bro. C. C. 243.

MAVOR v. DRY*.

1824.
23d & 30th July.

*Amendment,
Costs.*

IN 1816 one *Pyne* projected a Literary Work to be published in Numbers; but being unable, from want of funds, to carry his design into execution, he agreed with *A. Dry*, the late Husband of the Defendant, that they should become Partners in the Work; that *Dry* should find the Capital, and *Pyne*, the Labour and Talent necessary to complete it; and that the Profits should be shared equally between them. Several Numbers of the Work were published under this Agreement; but before the Work was completed the parties agreed to dissolve Partnership. A Deed dated the 30th of October 1818 was accordingly executed by them, by which the Partnership was dissolved, and *Pyne* assigned to *Dry* his Interest in the Copyright and the other effects of the Partnership; and it was agreed that *Pyne* should publish one of the remaining Numbers at the end of every Two Months; that *Dry* should pay him 50*l.* on the publication of each Number, and 500*l.* on the completion of the Work, provided it should be finished on or before the 1st of July 1819. *Dry* died in April 1820, having appointed the Defendant his Executrix. In April 1822 a Commission of Bankrupt was issued against *Pyne*, and the Plaintiff was chosen his Assignee. The Bill, after shortly noticing the Deed of Dissolution, insisted that it was void, as having been executed after the

Plaintiff by his Original Bill sought to set aside a Deed. After the Answer was filed he, under the usual Order, amended the Bill by making quite a different Case, and sought to establish the Deed. The Court ordered him to pay the Costs of the Original Bill and of certain Accounts set forth in the Answer in compliance with the prayer of that Bill, and the Costs of the Motion.

* From the end of Trin. Term, in this year, until the 1st of November following, the *Vice-Chancellor* was compelled to discontinue his sittings by severe indisposition. During that interval the *Master of the Rolls* presided in the Vice-Chancellor's Court.

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act of Bankruptcy on which the Commission issued, and that the Partnership continued till *Pyne's* Bankruptcy, and prayed for an account of the Copartnership dealings and transactions, and for such other relief as the Plaintiff was entitled to, supposing the Partnership to have continued as alleged by the Bill.

The Defendant in her Answer insisted that the Deed of Dissolution was valid. But it appeared, by the Accounts set forth in it, in compliance with the prayer of the Bill, that, assuming the Deed of Dissolution to be void and the Partnership to have continued till *Pyne's* Bankruptcy, there would be a balance of 500*l.* due to *Dry's* Estate. Upon this the Plaintiff obtained the common Order to amend his Bill, on payment of 20*s.* Costs; and under that Order he entirely varied the Case made by his Bill, and, after stating fully the Deed of Dissolution and treating it as valid, he prayed that it might be established and carried into effect.

The original Bill consisted of 122 folios, 78 of which were omitted in the amended Bill. The amended Bill contained 126 folios.

The number of folios in the Answer was 226, of which not more than 50 or 60 related to the contents of the amended Bill.

The Defendant now moved that the original Bill might be dismissed with Costs, and the amended Bill be ordered to stand as the original Bill; that the Plaintiff might be ordered to pay to the Defendant so much of the Costs of the original Bill and Answer as had been incurred by her in consequence of the claim, made by the Plaintiff in his original Bill, to have an Account taken of the Partnership dealings and transactions, and the

consequent relief prayed respecting the same ; and that such Costs might be taxed ; that till they were paid all further Proceedings in the Suit might be stayed ; and that the Plaintiff might be ordered to pay the Costs of the Motion.

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Upon notice of this Motion being given, the Plaintiff's Attorney made an Affidavit, in which he deposed that, from the Answer, although it appeared obvious to him that the Suit as originally instituted might be prosecuted with success, it also appeared that, by amending the Bill and seeking to establish the Deed of Dissolution set up by the Answer, the Bankrupt's Estate would be thereby benefitted ; inasmuch as it appeared to him, from the Answer, that the consideration Monies therein mentioned to have been paid to the Bankrupt had not been paid, but that a considerable portion thereof still remained owing, and that no matter was inserted either in the original or amended Bill which was foreign or immaterial to the Plaintiff's Case, or for any other purpose save the legitimate objects of the Suit.

Mr. *Heald* and Mr. *Whitmarsh*, in support of the Motion, cited *Smith v. Smith* (a), and said that in that Case the Defendant had miscarried by taking a step in the Cause before he made the Motion ; but that that was not the case here : and they also referred to *Dent v Wardel* (b), and *Watts v. Manning* (c).

Mr. *Horne* and Mr. *Bridgman* for the Plaintiff :—

No such Motion was ever made as that an amended Bill should stand as an original one. If the Court should dismiss the original Bill, what would become of the Answer to it ? The original and the amended Bill form

(a) Coop. 141. (b) 1 Dick. 339. (c) Ante. vol. I. 421.

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but one record, and your Lordship cannot dismiss the former and retain the latter. In *Smith v. Smith* an Order in the nature of a Decretal Order had been made. The merits of that Case had been before the Court, and the Plaintiff by amending his Bill attempted to make a new Case, varying not only from that made by the original Bill, but also from the Issue directed by the Court. In order to entitle the Defendant to extra Costs, a case of particular oppression must be shown; *Earl of Masserene v. Lyndon* (d). No such case has been made out here. The Plaintiff was a Trustee for himself and the other Creditors of the Bankrupt, and finding, from the Answer, that it would be more beneficial for himself and those with whose interests he was entrusted, that the Deed should be established than that it should be set aside, he would not have done his duty unless he had amended his Bill with a view to the attainment of that object.

THE MASTER OF THE ROLLS:—

The rule that the Plaintiff shall pay 20s. Costs only on amending his Bill, does not bind the Court where there has been great oppression and vexation. This appears to me to be a case of that nature. The original Bill sought to set aside the Deed of Dissolution. To that Bill Mrs. Dry put in a long Answer insisting on that Deed. It is clear that the Plaintiff saw that if he went on with the Suit his Bill would be dismissed. He then alters the whole form of the Bill, and seeks relief on the foundation of the Deed. There may be cases in which, on the coming in of the Answer, it may be necessary to make very material alterations in the Bill, on account of disclosures made by the Answer. But that was not the case here. For it appears that the

Plaintiff was aware of this Deed of Dissolution, and of the circumstances under which it was executed at the time of filing the original Bill, for he notices it in that Bill. I think that this Case is within the principle of the decision in *Dent v. Wardel*; and I shall therefore give the Defendant the Costs of the original Bill, and of so much of the Answer as relates to the Accounts of the Partnership, and also the Costs of this Motion.

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MAVOR
v.
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REYNOLDS v. BLAKE.

ONE *Chandler*, having opened the biddings for Lot 1 of the Estates sold under the Decree in this Cause, and paid a deposit of 40*l.*, was declared the Purchaser of it at the re-sale. The *Master*, upon the Title being referred to him, reported against it. *Chandler* afterwards died. His Executors now moved that the *Accountant-General* might be directed, out of a sum of Cash standing in his name to the Credit of the Cause, to pay to them the Deposit; and that it might be referred to the *Master* to tax their Costs and the Costs of the Motion, and that the same when taxed might be directed to be paid to them by the Plaintiff.

1824.
15th August.
Vendor and
Purchaser.
Costs.

If the *Master* reports against the Title to an Estate purchased under a Decree, the Purchaser will be paid the Costs of the Reference out of the Funds in the Cause.

Mr. *Turner*, in support of the Motion, cited *Fielder v. Higginson (a)*, and said that on reference to the Registrar's Book, it appeared that the Purchase in that Case was made under the Decree.

Mr. *Knight* for the Parties in the Cause:—

Each Case must depend upon its own peculiar cir-

(a) 3 V. & B. 142.

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cumstances. If this had been a Bill for specific performance, it would not have been of course that if the Vendor failed in making a good Title the Purchaser could get his Costs. The Title of part of the Lot was under a Mortgage for a long term of years, which had not been foreclosed; and the *Master* was of opinion that the equity of Redemption was not barred by length of time, and for that reason reported against the Title.

The *Master of the Rolls* ordered the Deposit, and the Costs of the reference of the Title and of the Motion, to be paid out of the Cash standing in the *Accountant-General's* Name to the Credit of the Cause (b).

(b) See *Lechmere v. Brasier*, 2 J. & W. 287.

LONG v. LONG.

1823.
23d November.

1824.
11th May and
9th November.

JANE LONG, being entitled to several Sums of *Ward of Court.*
Stock, partly in Possession, partly in Reversion, and *Settlement.*
partly Contingent, which had been transferred into the *Jurisdiction.*
Accountant-General's name under the Decree in a Suit A Lady entitled to a Fund in
for the administration of her late Father's Assets and Court, married
for carrying the Trusts of his Will into execution, married the day after
on the day after she came of age. No Settlement was she came of age.
ever made by the Husband: but about three weeks After the Marriage a Settlement
after the Marriage the whole of the Wife's property of her
(except 1,743*l.* 14*s.* 11*d.* Stock, which was agreed to Property was
be transferred to the Husband for his own use,) was made on her and
assigned to Trustees upon trust to pay 100*l.* a year to her Husband
Mrs. Long for her life, for her separate use, and the for their lives,
remainder of the Dividends to Mr. and Mrs. Long for and on the Children of the Marriage
their lives successively, and, after the decease of the absolutely;
Survivor, to stand possessed of the Capital for the but the Wife
Children of the Marriage; and, in default of such Children never consented
dren, in trust for Mrs. Long, if she should survive her in Court to
Husband, but if not, then in trust for such person as a transfer of the
she should by Will appoint, and, in default of appointment Fund to the
ment, in trust for Mrs. Long absolutely. Trustees. After
the Husband's death, and the
the birth of a Child,
the Settlement
was, at the Suit
of the Wife,
declared void,
because it contained
no provision for a second
Marriage, and because the rights acquired by the Husband
were, on account of the precipitation of the Marriage, a surprise on
the Wife.

A fortnight after the date of the Settlement an Order
was made, upon a Petition presented by Mr. and Mrs.
Long and others in the Suit before mentioned, that the
second Marriage, and because the rights acquired by the Husband
were, on account of the precipitation of the Marriage, a surprise on
the Wife.

1824.

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LONG

Sums of Stock to which Mrs. *Long* was entitled in possession should, after the transfer of the 1,743*l.* 14*s.* 11*d.* Stock, be carried over, in trust in that Suit, to the Settlement Account; and, it having been suggested to the Court, at the hearing of this Petition, that there was some question whether there had not been an Agreement for a Settlement prior to the Marriage which bound the Husband's interest in the Wife's fortune, it was, by the same Order, referred to the *Master* to inquire whether there had or had not been any such Agreement, and, whether any Settlement had been executed conformably thereto.

About six months after the Marriage, and before the *Master* made his Report, the Husband died, leaving his Wife *enseinte*; and on the 30th of May 1822 she was delivered of a Daughter.

The *Master* made his Report on the 6th of February 1823, and thereby certified that there was no Agreement for a Settlement prior to the Marriage, which bound the Husband's interest in his Wife's fortune.

After this Report a Bill was filed by the Trustees of the Settlement against Mrs. *Long* and her infant Daughter, stating that it was contended, on the part of Mrs. *Long*, that the Settlement, having been executed merely as a postnuptial Settlement of property solely moving from her, and which was then actually under the protection of the Court, whilst she was under coverture, and without any valuable consideration or property settled moving from or on the part of her late Husband, and the more valuable parts of such settled property being Interests of a reversionary nature, and, in one instance, of a contingent nature, the Settlement was not,

or was not to be considered as binding upon her; and that, at all events, she was entitled to have the same reformed, or a new Settlement executed under the directions of the Court; and praying that it might be referred to the *Master* to inquire and certify whether, under all the circumstances which existed, the Settlement was a fit and proper Settlement to have been executed as to the fortune and property of Mrs. *Long* so remaining in the Court, due regard being had to the particular nature of each species of such property; or whether, in his opinion, the same ought to be reformed, varied or altered; or whether a new Settlement ought to be made in lieu thereof, in respect of the fortune and property of Mrs. *Long* then under the control or directions of the Court; and that the same might be effectuated accordingly under the Decree of the Court.

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v.
LONG

On this Cause coming on to be heard, the *Vice-Chancellor* said that this Bill was properly filed by the Trustees, provided the Settlement were established; but, if the Court should be of opinion that the Settlement could not be sustained, it could only dismiss the Bill; that, therefore, it would be better to file another Bill to come on at the same time with the original Cause, by which means the Case would be put in such a shape that, upon the discussion of the merits between the Mother and Child, the Court could make a Decree settling their rights and that would be binding on them.

A Cross-bill was accordingly filed by Mrs. *Long* against the Trustees and her infant Child, charging that, for the reasons stated in the original Bill, the Settlement ought to be declared void, and praying that it might be declared void accordingly.

1824.

LONG

v.

LONG.

The original and cross causes now came on to be heard together.

Mr. *Hart* and Mr. *Beames*, for the Plaintiff in the Cross Cause, said that the Settlement was such as this Court would not have approved for a Ward, because it made no provision for a second Marriage; and that the Marriage, having taken place the day after the Lady attained her age, the Settlement was a fraud upon the jurisdiction of the Court.

Mr. *Bell* for the Trustees.

Mr. *Sugden* and Mr. *Treslove* for the Infant:—

The Settlement recites an ante-nuptial Agreement. Suppose there had been a previous Agreement of which the Settlement was, in fact, a violation; yet, as the Lady was of age, it is to be considered that the control of the Court was so far gone. If the Husband had made exactly such a Settlement as the Court would have compelled him to make, the Court would never treat it as binding on him and not on his Wife. Besides it is very material to state that it appears, by the Order for transferring the Funds to the Settlement Account, that Mrs. *Long* was examined in Court, and consented to the Trusts of the Settlement being carried into effect. She is therefore, bound by that consent, and is precluded now from objecting to the Settlement.

The VICE-CHANCELLOR:—

It is true that this is a Settlement which the Court would not have approved, for the reason stated; and the event which has happened here fully justifies the precaution of the Court. In the case of Mr. *Basely*, where the Marriage was had during the Infancy of the Lady,

and in contempt of the Court, the *Lord Chancellor* refused to give up any part of the Lady's property after she came of age, until Mr. *Basely* had consented to execute such Settlement as the *Master* should approve. But here, the Lady being of age, there was no contempt of the Court in the Marriage; and the jurisdiction of the Court over her property had determined. The Husband and Wife were competent to dispose of her property in Court; and the Wife, having confirmed the Settlement upon her personal examination, must be bound by it. Declare accordingly.

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—
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It being afterwards discovered that Mrs. *Long* had consented merely to the 1,743*l.* 14*s.* 11*d.* Stock being transferred to her Husband, and had not confirmed the Settlement, and the *Vice-Chancellor* having been furnished by Mr. *Belt* with a note of a Case of *Austen v. Halsey (a)*, His Honour ordered the Causes to be again

(a) This note, which we are enabled to publish by the kindness of Mr. *Belt*, was as follows :

AUSTEN v. HALSEY.

11th March 1802. Reg. Lib. 1801. A. fol. 251.

Miss Austen having been a Ward of the Court, and having lately attained her age of twenty-one, a Settlement previous to her Marriage with Mr. *Bedford*, (dated July 6th 1800,) was executed, whereby (amongst other things) a sum of 1,000*l.*, part of her fortune, was given to the intended Husband, and 2,000*l.*, other part of her property, was settled to be laid out in 3 per cent. Consols in the names of Trustees, the Dividends of which, after the Marriage, were to be paid to Mr. *Bedford* for life, with Remainder to Mrs. *B.* for life; and, after the decease of the Survivor, the Trustees were

The Court retains its Jurisdiction over the property of a Ward of the Court after the Ward attains 21, so long as the property remains in Court; and, if the Ward marries, will order a proper Settlement to be made, or reform an improper one, unless the Ward consents to the Settlement either in Court or under a Commission.

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put in the paper for judgment, and this day delivered judgment as follows:—

The VICE-CHANCELLOR:—

It is not the habit of the Court, upon the Marriage of a Female Ward, to settle the whole of her property in remainder, after an Estate for life to her, upon the Child or Children of that Marriage; because it may happen that she may be left a very young Widow, and ought, therefore, to have the means of making some provision, in that case, for a second family. The event which has happened in this Case proves the wisdom of that rule of the Court. Here the Husband died in the year of the

to stand possessed of the said Sum and the Interest in trust for the Child or Children of Mr. *Bedford* on the body of his said Wife to be begotten, &c.

The Marriage took place shortly afterwards. Upon the Suit, which involved many important questions relative to Real Estate, &c. coming on for further directions before Lord *Eldon*, C. on the 27th November 1801, his Lordship referred it to Mr. *Wilmot* to inquire, &c. Whether the above was a proper Settlement, and, in case the *Master* should find it was not a proper Settlement, Mr. *Bedford* was then to lay proposals before the *Master* for a proper Settlement on his said Wife and the Children of the Marriage; and, in either case, the said *Master* was to state the same, with his opinion thereon to the Court, and to make a separate Report.

The *Master* certified his opinion that the Settlement was a proper one. Mr. and Mrs. *Bedford* presented their Petition, praying a confirmation of this Report and the consequential directions. The Petition came on before Lord *Eldon*, C., when, upon Mr. *Hall*, of Counsel for the Petitioner, saying, amongst other things, that he considered such a reference could not have been intended.—

Marriage, and before the birth of their only Child. The Settlement in question, which gives the whole of this young Lady's fortune after her death to this only Child, is not, therefore, such a Settlement as this Court would have approved of; and the question is whether it can now be corrected. Here the young Lady married, without any Settlement, the very day after she came of age; and the subsequent Settlement is, therefore, to be considered in this Court as the act of the Husband alone. If the young Lady, after the Settlement made, had confirmed it by her personal consent in Court to the transfer of the property to the Trustees of the Settlement, she would have made it her own act, and would have been bound by it. But it appears that her consent in Court was given only to the payment of a sum of 1,743*l.* 14*s.* 11*d.* Stock to her Husband; and the reference made upon that occasion to the *Master* proves

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The *Lord Chancellor* observed that Mr. *Hall* was wrong; that he fully intended it, and drew the Order himself, since he could never do it in a fairer case; and that he did so to prevent a common mistake. He wished it to be understood that though a Female Ward of the Court when of age might make whatever settlement of her property she pleased, and might effectuate this by consenting personally in Court, or under a Commission for the purpose; yet that, where this was not done, her property would never be discharged from the protection of the Court, except by the order of the Court, and consequently, until such proceeding, she and her property must always be considered as having the protection of the Court still around her. In the Case before the Court his Lordship saw no objection. He did not anticipate any when he made the reference, and therefore it was a stronger Case to settle the practice upon. Upon the matter before him his Lordship confirmed the *Master's* Report, and made the Order as prayed.

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that all consideration of the validity of the Settlement was necessarily reserved. In the case of *Austen v. Halsey*, which has been referred to, Lord *Eldon* is stated to have held that even in the case of an ante-nuptial Settlement, after a Female Ward has attained her age of twenty-one years, her property is not bound unless by her personal consent in Court; and that, notwithstanding such ante-nuptial Settlement, the Court will not part with the property until a Settlement is made to the approbation of the Court. And in that Case Lord *Eldon* sent it to the *Master* to inquire whether the ante-nuptial Settlement was a proper Settlement. The principle of that decision goes much beyond the circumstances of the present Case. Here there was so much precipitation in the fact of the Marriage, which gave the Husband the legal title to his Wife's personal property, that his power of disposition might well be impeached upon the ground of surprise upon the Lady, who had been of age only a single day.

Declare that the Settlement is void, in so far as it limits to the Wife an Estate for life in the Trust Property in the event of her surviving the Husband, and in so far as it limits the Trust Property after the death of the Wife to the Child or Children of the Marriage; and refer it to the *Master* to consider and Report what would have been a proper Settlement of the Trust Property in the event of the Wife surviving her Husband, and there being an only Child of the Marriage; and reserve the consideration of further Directions and Costs.

CAWTHORN v. CHALIE

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24th Nov.
Administration.
Pleading.
Demurrer.

MATTHEW CHALIE, *Edward Green*, and *John Chalié*, deceased, had been in partnership as Wine Merchants; and, after *John Chalié*'s death, the business was continued by the Survivors. In November 1813 they dissolved Partnership. The Accounts of either of the Partnerships had never been finally settled. In August 1821 *Green* assigned to the Plaintiff his share of the Profits of both the Partnerships, as an indemnity for having joined as a Surety for him in a Bond. The Bill prayed to have the Accounts taken, and the Affairs of the Partnerships wound up. It alleged that there was not then any personal representative of *John Chalié*, but that the Defendant *Matthew Chalié* was his only surviving next of kin, and was then entitled to take out Administration to his Estate, but that he refused so to do, or to permit the Plaintiff to obtain the same; and that the Plaintiff, by reason of such refusal, was unable to obtain Letters of Administration to *John Chalié*, or to make his personal representative a party to the Suit.

Where a Partner dies leaving the Partnership Accounts unsettled, the Ecclesiastical Court will grant Administration of his Effects to the surviving Partners, or any persons claiming under them, if his next of kin decline it.

The Defendant, *Matthew Chalié*, demurred to the Bill in the following terms:—

“ This Defendant, by protestation, &c. and, for cause of Demurrer, sheweth, That it appears, by the said Complainant's own showing in the said Bill, that a legal personal Representative or Representatives of *John Chalié* deceased, in the same Bill named, is or are a necessary Party or necessary Parties to the Accounts by the same Bill sought to be taken, so far as the same relate to the Partnership dealings in the same Bill mentioned to have

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taken place in the lifetime of the said *John Chalié*; and that no valid or sufficient reason is, by the same Bill, alleged why Letters of Administration of the Goods and Chattels, Rights and Credits, of the said *John Chalié* left unadministered by his Widow *Susannah Chalié*, in the said Bill named, have not been taken out by the said Plaintiffs, or by some Person or Persons who might be made a Party or Parties to the same Bill: and yet the said Plaintiffs have not, by their said Bill, stated that any such Letters of Administration have been taken out, nor made any Person or Persons, in the character of such personal Representative or Representatives, a Party or Parties to the said Bill: Wherefore, &c."

Mr. *Horne* and Mr. *Tinney*, in support of the Demurrer, insisted that the allegations of the Bill did not form a sufficient reason for proceeding in the Cause without a representative of *John Chalié*; and the Vice-Chancellor was of that opinion, upon the ground that the refusal of *Matthew Chalié* to permit the Plaintiff to take out Administration to *John Chalié* was altogether nugatory, as the Plaintiff's Title to such Administration could not depend upon *Matthew Chalié*'s permission, nor could be affected by his withholding it.

Mr. *Agar* and Mr. *Ching* appeared in support of the Bill, and objected that this was in form a speaking Demurrer (a).

The Vice-Chancellor ordered the Case to stand over, in order that the opinion of a Civilian might be obtained whether the Plaintiff, under the circumstances stated in the Bill, was or was not entitled to procure

(a) See *Brownwood v. Edwards*, 2 Vez. 243; *Parry v. Owen*, 3 Atk. 740; and *Edsell v. Buchanan*, 4 Bro. C. C. 254, and 2 Ves. jun. 83.

an Administration to the Estate of *John Chalié*; and directed the Case to be spoken to upon the form of the Demurrer, when such opinion should be taken; the Defendant's Counsel being taken by surprise as to that objection.

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A ~~C~~ase having accordingly been laid before Dr. *Jenner*, he gave his opinion thereon in the following words:

"I am of opinion that *William Cawthorn* has not such an interest in the Effects of *John Chalié* as will entitle him to be considered as a Creditor, and, in that character, to cite the next of kin to accept or refuse Administration of his Effects. But I am of opinion that the Ecclesiastical Court will grant a limited Administration to a person nominated by him for the purpose of substantiating proceedings in Chancery, on the refusal of the next of kin after citation, and upon showing the necessity for such a representation."

When this Case was again mentioned, upon the production of Dr. *Jenner's* opinion, the *Vice-Chancellor* allowed the Demurrer, stating that the Plaintiff must procure a limited Administration to be granted to *John Chalié's* Estate according to that opinion; and, as to the form of the Demurrer, he observed that a speaking Demurrer was where, by way of argument or inference, the Demurrer suggested a material fact which was not to be found in the Bill: That here there was much surplusage in the Demurrer, but no suggestion of any new material fact.

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24th Nov.

*Vendor and
Purchaser.*

HOPCRAFT v. HICKMAN.

Two Surveyors, who it had been agreed should fix the price of an Estate, stated in their Valuation the Sum to be paid and the quantity of Land, and that if it proved to be less either 84*l.* or 42*l.* should be deducted, according to the parts of the Estate in which the deficiency occurred, but did not state the quantity contained in each part. Held that the Valuation was uncertain, and that a specific performance could not be enforced.

Referees may take the opinion of a third person as evidence, but cannot previously agree to be bound by it.

THE Bill stated that the Plaintiff agreed to purchase an Estate of the Defendant at a price to be fixed by two Surveyors, one to be chosen by each party: That a valuation was made accordingly, and was afterwards reduced into writing, and was as follows:

"In pursuance of an Agreement, bearing date on or about the 13th May 1823, and made between *Thomas Hopcraft* of *Crowton* in the County of *Northampton*, Gentleman, of the one part, and *Thomas Hickman* of *Walcott*, in the Parish of *Barnock* in the County of *Northampton*, Esquire, of the other part; We the undersigned having been respectively named by said *Thomas Hickman* and *Thomas Hopcraft* to make the valuation of the Estate at *Crowton* in the County of *Northampton* therein mentioned, have this day viewed the same consisting of a Mansion-house and Offices and 73 A. 1 R. 8 P. of Arable and Pasture Land, and have mutually agreed that the value thereof is 5,460*l.* 2*s.* including the Timber and Fixtures thereof and Fruit and all other Trees, and we accordingly, in pursuance of said Agreement, declare the value thereof to be 5,460*l.* 2*s.*; and we also declare that, if there shall be any error in the admeasurement above mentioned, an allowance at the rate of 42*l.* for every Acre, either less or more than the said admeasurement, shall be made out of or in addition to the said Purchase-money, as the case may happen, if the mistake be in the allotment in *Horse Moor* Field over the Brook; and an allowance of the same nature at the rate of 84*l.* for every Acre, if

the mistake be in the other part of the Estate on the House-side of the Brook. Dated the 12th January 1823. *Abraham Paddy Phillips, Barnet John Hopcraft :*"

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That a few days after the Valuation was made, the Defendant wrote a Letter to the Plaintiff in the words following :—

" Sir, I do hereby give you notice that I consider the mode pursued by Mr. *Abraham Paddy Phillips* and *Barnet John Hopcraft*, in valuing the Mansion-house, Lands and Premises at *Crowton* between you and myself, irregular and not according to the Agreement entered into by us, inasmuch as they did appoint two Builders or Surveyors to value the Mansion-house and Buildings, part of such Estate, without my consent and approbation, and I do therefore object to the interference of such persons, and refuse to abide by the present Valuation :"

That *Barnet John Hopcraft* and *Abraham, Paddy Phillips*, being both of them Land-surveyors only and not accustomed to survey and value Houses and Buildings, did of themselves determine or agree to obtain the assistance of *William Litchfield* and *George Starkie* in valuing the said Mansion-house and Buildings, and that *Litchfield* and *Starkie* were Builders and Surveyors and Valuers of Houses and Buildings by trade or profession, and were and are well known to be skilful in such matters, and that the determination or agreement of *Barnet John Hopcraft* and *Abraham Paddy Phillips* was formed upon the proposal and suggestion of *Abraham Paddy Phillips*, the Valuer appointed by the Defendant as aforesaid ; and that, in pursuance of such determination and agreement, the said *Barnet John Hopcraft* and *Abraham Paddy Phillips* employed *Litchfield* and

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Starkie to survey and compute the value of the Mansion-house and Buildings, but not of any other part of the Estate and Premises, and that *Litchfield* and *Starkie* did accordingly survey and examine the said Mansion-house and Buildings, and did communicate their opinion and judgment as to the value thereof to *Barnet John Hopcraft* and *Abraham Paddy Phillips*, and that *Barnet John Hopcraft* and *Abraham Paddy Phillips*, having considered such opinion and judgment, adopted the same as their own, and founded their Valuation of the said Mansion-house and Buildings thereon: That, at the time when the said Valuation was agreed upon, *Barnet John Hopcraft* and *Abraham Paddy Phillips* were attended by Mr. *Robert Weston* as the Solicitor, or Agent of the Solicitor for the Defendant, and by Mr. *Alfred Hayward* the Solicitor for the Plaintiff; and that the employment of *William Litchfield* and *George Starkie* as aforesaid was communicated to, and was perfectly well known by Messrs. *Hayward* and *Weston*, and was not in any manner objected to by them or either of them; and that the written Declaration or Valuation was drawn up and signed under and with the sanction and acquiescence of the said Mr. *Weston* on behalf of the Defendant, after he well knew that *Barnet John Hopcraft* and *Abraham Paddy Phillips* had availed themselves of the knowledge and assistance of *Litchfield* and *Starkie*. And the Bill prayed that it might be declared by the Decree of the Court that, under the Agreement and the Valuation of the Premises so made by *Barnet John Hopcraft* and *Abraham Paddy Phillips*, the Defendant was the Purchaser of the Premises at the price of 5,460*l.* 2*s.*; and that he might be compelled to complete such purchase.

To this Bill the Defendant put in a general Demurrer.

Mr. *Horne* and Mr. *West* in support of the
Demurrer:—

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If the Price of this Estate had been properly fixed by the Valuers, it would have been the same as if it had been fixed by the parties themselves. But the Price was not properly fixed by the Valuers. The Valuation by which the parties were to be bound was to be made by Surveyors appointed by each party; and, if they could not fix a value, whether from ignorance or any other cause, their only course was to choose an Umpire. The Valuers acknowledged by their conduct that they were unable to fix a value; but, nevertheless, they never appointed an Umpire. They did not choose to exercise the power which had been delegated to them; but they called in two other persons to exercise it. Such conduct is a direct violation of the maxim "*delegatus non potest delegare.*" There is a great difference between a Valuation made by a Builder, and one made by a Land-surveyor. The latter would consider the House with reference to the Land only. The former would estimate it according to the value of the Materials. It is impossible to hold that the parties are bound by this Valuation.

There is another objection to this Valuation: that it is not final. It was clearly intended by the parties that the Valuation should be made in such a manner as to prevent any further dispute between them. But the Price is not finally fixed by this Estimate. It may be either to be increased or diminished, according as the number of Acres shall turn out to be more or less than the estimated quantity. It is nowhere asserted that the Estate has been accurately measured, and that it contains the quantity of Land mentioned in the Valuation. Consistently with this Award the Sum stated as

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the Price might have been diminished one-half. It is quite clear that, before a specific performance can be decreed, the Price must be fixed either by the parties, or by those to whom they delegate that duty. Can the Court, in this Case, say what the Price to be paid for this Estate is? If it cannot, a specific performance cannot be decreed (a).

Mr. *Bickersteth*, in support of the Bill:—

The objection that this Award is uncertain cannot be made upon Demurrer. It must be done either by Plea or Answer. Without an allegation of Error there cannot be any relief against this Award.

The VICE-CHANCELLOR:—

If the two Arbitrators had agreed together to be bound by the opinion of the two Builders whom they consulted, there would have been much weight in the first objection to the Award. But, according to the statement of the Bill, upon which I am now to act, the Arbitrators received the opinion of the two Builders merely as evidence, and adopted it as their own upon the credit which they gave to the testimony. As to the second objection; *id certum est quod certum reddi potest*: and, if the addition or deduction upon remeasurement had been to be made at a certain rate per Acre as to all the Land, there would have been no difficulty. But the Arbitrators have directed that the addition or deduction should be made at the rate of 84*l.* an Acre, as to Land on the House-side of the Brook; and at the rate of 42*l.* an Acre, as to Land on the other side of the Brook; and have not told us how much of the 73 A. 1 R. 8 P. (which they estimate to be the whole quantity of Land) they have considered to be lying on the House-side of the

(a) See *Emery v. Wase*, 5 Ves. 846; and 8 Ves. 505.

Brook; and, consequently, there are no means of determining to what extent the 84*l.* is to be allowed, or to what extent the 42*l.* only is to be allowed. It is for this reason that I consider the Award not to be final and certain, and allow the Demurrer.

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CARRINGTON v. JONES.

1824.

26th Nov.

*Tithes.
Evidence.
New Trial.*

THE Bill stated that the Plaintiff was, sometime in the year 1799, lawfully presented, instituted and inducted to the Vicarage of the Parish and Parish Church of *Berkley*, and had ever since been the true and lawful Vicar thereof; and, as such Vicar, was lawfully entitled to have, receive and take all and singular the Tithes yearly arising, growing, renewing or increasing *within the said Parish*, and the titheable places thereof, (except the Tithes of Corn, Grain and Hay): And it prayed for an Account and Payment of the Tithes to which the Plaintiff was so entitled.

The Custody from which a Document offered in Evidence is taken cannot be proved by an interested person.

At the hearing of the Cause the *Vice-Chancellor* directed the following Issues to be tried.

The Plaintiff represented himself in his Bill as entitled to the Tithes of the Parish of *B.* without noticing a District called *H.* which was part of the Parish, but had

1st. "Whether from time whereof, &c. there hath been payable and paid, and of right ought to be paid, to

of late years been considered as a distinct Parish. At the Trial of Issues as to certain Moduses in *B.* the Plaintiff proved that *H.* was part of *B.* and that the Moduses did not prevail in *H.* The verdict however was in favour of the Moduses. A Motion by the Plaintiff for a new Trial was refused, because the evidence as to *H.* was a surprise upon the Defendants, and was calculated to defeat the intention of the Court in directing the Issues.

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the Vicar of the Parish of *Berkley* in the County of *Gloucester*, by the Owners and Occupiers of Lands in the said Parish, for every Milch Cow kept within the said Parish at any time within the year, the sum of one penny at Lammas in each year, for and in satisfaction of the Tithe of the Milk of such Cow."

And "Whether from time whereof, &c. there hath been payable and paid, and of right ought to be paid, to the Vicar of the Parish of *Berkley* in the County of *Gloucester*, by the Owners and Occupiers of Lands in the said Parish, for every Colt foaled within the said Parish at any time within the year, the sum of one penny at Lammas in each year, for and in satisfaction of the Tithe of such Colt."

The Verdicts were in favour of both Moduses.

The Plaintiff now moved for a new Trial. The grounds upon which the Motion was made will appear from the Arguments.

Mr. *Sugden*, Mr. *Curwood* and Mr. *Oldnall Russell* in support of the Motion:—

1. The first ground upon which we are entitled to ask for a new Trial, is that certain Receipts for these Moduses, signed by two persons now deceased, named *James* and *Richard Croome*, were admitted in evidence without proving the characters of the persons who signed them. It was not shewn whether they received the Tithes as Lessees, or as Collectors for the Vicar. Mrs. *Viner*, who was the Daughter of *Richard* and Sister of *James*, when examined as to this point, stated merely that her Father and Brother *held* under four of the former Vicars; and that her Brother *took* the Tithes, and her

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Father before him. These Receipts could not prejudice the Plaintiff's claims, unless the parties giving them were Collectors for the Vicar; and, in that case, the Defendants totally failed in proving that they filled that character. It has been decided, in *Short v. Lee* (a), that a Book in the hand-writing of a person purporting to contain accounts of Tithes collected by him seventy years ago, cannot be received in evidence without proof that that person was Collector of Tithes at that time; and the Case of *Manby v. Curtis* (b) is to the same effect. Nor were these persons proved to be Lessees. If they were so, they must have held under a Lease; for a Deed is always necessary to pass an interest in Tithes, except where the Occupier retains them by agreement with the Incumbent. Now no Lease was produced, nor was any evidence given of its loss so as to make the parol evidence of Mrs. Viner, that her Father and Brother held the Tithes, admissible; nor is there any thing to satisfy the Court that the Lease may not now be in existence, and in the possession of the Executors of the Lessees. But, supposing it to have been satisfactorily proved that the Croomes were Lessees, the Plaintiff's rights cannot be affected by these Receipts; because a Lessor cannot be prejudiced by the acts of his Tenant (c).

2. The Moduses were laid as covering the whole Parish of *Berkley*. We proved, from the Nona Rolls, the Parliamentary Survey and the Minister's Accounts of the 22d Henry 8, that a Vill called *Hill* formed part of the Parish of *Berkley*, though it has now acquired the reputation of being a distinct Parish. And it appeared from the Terrier belonging to this Parish that the Inhabitants of *Hill* were bound to keep in repair the Mounds

(a) 2 J. & W. 464. See particularly page 468.

(b) 1 Price 225. (c) See *Wood v. Veal* 5 B. & A. 454.

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of the churchyard of *Berkley*. Now, as we also proved that *Hill* pays Tithes in kind at this day, it is impossible that these Moduses can be supported, as they are alleged to extend over the whole Parish. The evidence, therefore, given by us to prove that *Hill* was part of the Parish of *Berkley*, was very material. But the learned Judge withdrew from the consideration of the Jury the question whether *Hill* was or was not part of the Parish of *Berkley*, and directed them that *Hill* was a distinct Parish. We do not pretend to say how *Hill* became separated from *Berkley*. Our objection is that the fact of its being so was left to the Jury as if we had given no evidence upon that subject.

3. Certain Receipts for these Moduses and other Documents were handed in on behalf of the Defendants, and the learned Judge allowed persons who were occupiers of Land in the Parish, and were, therefore, interested, to prove out of what custody they had been obtained. Any person may hand in Documents, but if it is necessary, in order to give authenticity to them, to prove the custody from which they came, an interested Witness cannot be allowed to give evidence on that subject. *Lord Clanrickard v. Denton (d)*.

Mr. Taunton, Mr. Heald, Mr. Twiss and Mr. Koe, for the Defendants, were desired by the Vice-Chancellor to confine themselves to the question whether *Hill* was part of the Parish of *Berkley*.

The Persons who composed the Parliamentary Survey were not infallible. Their duty was to ascertain the value of property which had belonged to the Religious

(d) 1 Gwill. 360.

Houses; and not the divisions of Counties, Hamlets and Parishes; and they, consequently, had no authority to decide upon any other question than that of value. The words "In the Parish of *Berkley*" which follow the naming of this District in the survey, are merely incidental. The attention of the Commissioners who made the survey was called to the rental and the occupation of the Lands; and it is too much to take it for granted that, because these words were used which were not material to the object of the Commissioners, *Hill* was always in the Parish of *Berkley*. Except this Instrument and the other Documents which were produced for the same purpose, all the evidence negatives that *Hill* was part of the Parish. Mr. *Lodge*, the present Incumbent of the living of *Hill*, stated, at the Trial, that it was not a member of the Parish of *Berkley*, but was a distinct Cure. With respect to the statement in the Terrier that the Parishioners of *Hill* were bound to repair the Mounds of the Church-yard of *Berkley*, that is evidence that *Hill* was then a distinct Parish from *Berkley*. The Parishioners who signed the Terrier could not have any interest in misdescribing the Parish. It is impossible to account for that burden being imposed upon *Hill*. But there might have been some connexion between the two Parishes which is now forgotten. The Founder of the Church of *Berkley* might have had property in *Hill*, and might have entailed that burden upon his property there. In order to support a prescription for a seat in an Aisle of a Church, it is an intendment perpetually made that the Aisle was built by the founder of the family which claims the seat. But, supposing that *Hill* is a member of the Parish of *Berkley*, the object of the Court in directing these Issues has been answered by these Verdicts; for your Honor's intention was to find whether these Moduses existed in that part of the Parish

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of which the Plaintiff is entitled to the Tithes. Besides the Defendant is precluded, by the statement in the commencement of his Bill, from taking this objection; and the Issue is quite consistent with that statement. The Plaintiff was aware, from the statement in the Terrier that there was a connexion between *Hill* and *Berkley* and, if he meant to take this objection, he ought to have amended his Bill and stated so, and words ought to have been introduced into the Issue with a view to ascertain whether the Moduses did not prevail in *Hill* as well as in *Berkley*. The taking of the objection in the present stage of the Cause is a surprise upon the Court, and the Plaintiff ought not to be allowed to avail himself of it.

Mr. *Curwood* in reply :—

If the Court declares that the Moduses prevail throughout the whole Parish of *Berkley*, it will bind the Incumbent of *Hill*. For there is no question that *Hill* is part of the Parish of *Berkley*. The Parliamentary Survey was taken, not by Commissioners, but by a large Jury of the County. It is impossible that the same mistake should be made in three public Documents. The parishioners of one Parish cannot prescribe that the parishioners of another Parish should repair the Walls of their Church. There may be a prescription in the same Parish, but not in different Parishes.

The *Vice-Chancellor*, considering the other grounds upon which the new Trial was moved for as not maintainable, stated that he entertained doubt whether an interested Witness could be permitted to prove out of what custody a produced document came, where such proof was essential to its reception as evidence; but that it was not necessary to consider the point further; because, if the Receipts in question had been rejected, he should not have

been satisfied, upon the remaining evidence, with any other verdict than that which had been found. And, as to the objection with respect to *Hill*, he observed that the Issues were framed according to the manner in which the Plaintiff had stated his own case upon his Bill, where he had represented himself as entitled to the Small Tithes throughout the whole Parish of *Berkley*, and that no notice was taken of *Hill* in any of the Pleadings in Equity; that the introduction of the Evidence as to *Hill* was, therefore, not only a surprise upon the Defendants, but was calculated to defeat the intention of the Court in directing the Issues, by enabling the Plaintiff to snatch a verdict upon a point not touching the merits of the Case in Equity between the Parties; and that, if the Jury had found a verdict for the Plaintiff upon the ground of *Hill* being a member of the Parish of *Berkley*, he would not have acted upon such a verdict; that, for these reasons, although he did consider that there was strong evidence that *Hill* was but a member of the Parish of *Berkley*, he must refuse the Motion for a new Trial, and must refuse it with Costs.

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The Order made was in the following words: "This Court doth refuse the Motion, although upon, the evidence given by the Plaintiff at the Trial of the Issue, the Jury might have been warranted in finding a different verdict, upon the ground that the alleged Parish of *Hill* was in truth but a Township of *Berkley*, and that the Moduses in question did not extend to such Township, and consequently did not prevail throughout the whole Parish of *Berkley*, as by the form of the Issues was affirmed by the Defendants; because such evidence so given by the Plaintiff was altogether a surprise upon the Defendants, and was inconsistent with the Case made by the Plaintiff

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in the Pleadings in Equity, and did not in any manner affect the merits of the Case in Equity between the Plaintiff and Defendants, and was calculated to defeat the trial of such merits, and to disappoint the intention of the Court in directing the Issues."

1824.
29th Nov.

*Receiver.
Tenant in
Common.*

TYSON v. FAIRCLOUGH.

THE Plaintiffs and the Defendant were Tenants in Common of some Freehold and Leasehold Houses under a Will of which the Defendant was Executor.

Motion for a Receiver by one Tenant in Common against his Co-tenant, on the ground that the latter had given notice to the Tenants to pay their Rents to him only, and had advertised the Estate for sale, refused, because the conduct complained of did not amount to an exclusion.

In 1814 the Defendant had entered into a written Agreement with the Plaintiffs to permit the latter to receive the whole of the Rents, until they had repaid themselves two Sums due to them from the Defendant. The Plaintiffs had been in receipt of the Rents ever since the Agreement was made; but, in May last, the Defendant gave notice to the Tenants to pay the Rents to him and not to the Plaintiffs, and that he would enforce such payment by distress if necessary.

In July the Defendant advertised the Houses for sale; upon which the Bill was filed for a Receiver and an Injunction to restrain the Sale: but, before the Injunction was served, the Defendant had actually sold all the Houses but one. The Bill insisted that a balance of 51 £ was still due to the Plaintiffs. The Answer stated that, by the Accounts rendered, such a Balance appeared to be due, but that, upon investigation of the Accounts, it was found that 25 £ only was due, allowing the Accounts to be just, which the Defendant did not admit; and that

the Defendant had tendered the 25*l.* to the Plaintiffs, but they refused to accept it: That the Plaintiffs had been repaid all that was due to them, or that they might have been repaid it if they had thought proper.

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Mr. *Agar* and Mr. *Koe*, for the Plaintiffs, now moved for a Receiver, and founded their Application, 1st. upon the Agreement; 2d. upon the Notice given by the Defendant to the Tenants, and his having sold the property, which they contended amounted to an actual exclusion of the Plaintiffs; and they cited *Evelyn v. Evelyn* (a), *Street v. Anderton* (b), *Milbank v. Revett* (c).

The VICE-CHANCELLOR :—

If the Defendant were now availing himself of his legal title to receive Rents and Profits which, under the Agreement, were, in effect, assigned to the Plaintiffs, there would be ground for the appointment of a Receiver; but according to the Answer he has fully paid the Sum mentioned in the Agreement, except a small Balance, which has been tendered to the Plaintiffs and refused. It is said, however, that the Notice given by the Defendant to the Tenants no longer to pay the Rents to the Plaintiffs but to him, the Defendant, amounts to an exclusion of the Plaintiffs from their own share of the Profits of the undivided Estate, and that where there is such exclusion a Court of Equity will, according to the Cases cited, appoint a Receiver. Exclusion is where one Tenant in Common receives the whole Rent, and excludes his Companion from the Share due to him. The Notice of the Defendant is not exclusion: Notwithstanding this Notice, the Tenants may pay

(a) 2 Dick 800. (b) 4 Bro. C. C. 414. (c) 2 Mer. 405.

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the whole of the Rents to the Plaintiffs, and certainly may safely pay to the Plaintiffs their due share of the Rents. I do not even consider, upon the circumstances of this Case and the Answer of the Defendant, that this Notice is evidence of an intention on the part of the Defendant to withhold from the Plaintiffs the share of the Rents which belongs to them. The Defendant does not dispute the title of the Plaintiffs; the Agreement is founded on the admitted title of the Plaintiffs; and the plain purpose of the Notice is to prevent the Plaintiffs from receiving the Rents, because they insist upon retaining the Defendant's Share in satisfaction of a Balance which, according to the Answer of the Defendant, is not due from him. I may observe that, even in the case of any actual exclusion of one Tenant in Common by another, I doubt whether this Court would appoint a Receiver. If it were an exclusion which amounted to an ouster at Law the party complaining must assert at Law his legal title. If it were not such an exclusion, this Court would compel the Tenant in Common in receipt of the Rents to account to his Companion; but would not, I think, act against his legal title to Possession; and the reason is, because the party complaining may at Law relieve himself by the Writ of Partition. It is upon this ground that this Court has constantly refused to restrain a Tenant in Common from cutting Timber, or doing any other act not amounting to destruction. Where the Estate in common is equitable, the Court does interfere; because it acts against the legal Estate of the Trustee only, who is guilty of a breach of trust if he permits one equitable Tenant in Common in any manner to prejudice the interest of the other. Of the Cases cited, *Street v. Anderton* was an equitable Estate; *Evelyn v. Evelyn* is but a word, and does not explain the nature of the Estate; and

Milbank v. Revett, which was very shortly and very loosely argued, considers that the principles which are applied to Partners are applicable also to Tenants in Common, which probably would not have been the opinion if the Case had been more fully argued.

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GILLESPIE v. ALEXANDER.

GENERAL GILLESPIE made four Testamentary Papers, all in his own hand writing. The first was as follows :—

1824.

6th & 7th Dec.

Legacy.

" Being perfectly in my senses, I declare this to be my last Will and Testament; and I accordingly leave the little I possess in the following manner :—I bequeath to my Daughter *Selina Gillespie*, the dear pledge of an attachment to a most amiable Woman who is no more, a sum of Money equal to 12,000 *l.* sterling, to be paid on the day of her Marriage, provided she has the approbation of the Majority of her Guardians; but in case she should marry imprudently, and without their consent, only the sum of 5,000 *l.* To Mrs. *Annabella Gillespie*, I bequeath the sum of 250 *l.* a year Annuity for her natural Life, which will be paid out of the Interest arising from the said 12,000 *l.* bequeathed to the afore-*Selina Gillespie*. I bequeath 1,000 *l.* to *George Gillespie*, a natural Son of mine, now residing in *Jamaica*. I bequeath 1,500 *l.* to *Robert Gillespie*, a natural Son by *Eugenie Pechier*, a French Lady of *St. Domingo*, who is to be heard of at *Kingston, Jamaica*. The Boy was at School sometime ago at *Mount Airy Academy, Philadelphia, America*. I bequeath 500 *l.* to my Son by Mrs. *Charlotte Wallen*; Major *Thorn* can give an account of her. I bequeath to my Housekeeper, now living with

Legacies given to the same persons, though by different Instruments, and, in some instances, of different amounts, held to be substitutional.

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me, 1,000*l.*; that will be paid to her from the sale of my Furniture, &c.; all the ready Money I have in the house, and my Linen and Cloaths. Captain *Byers* will be good enough to invest this Money for her in the hands of Mr. *Alexander*, who will send her to *Europe*, and, when she arrives at home, she will receive 250*l.* in Cash; the rest Mr. *Alexander* will purchase and lay out in Annuity for her natural Life. As I am not clear how my property may turn out, I cannot distinctly say how it is to be divided; but, to prevent disputes, it will be as follows: I will suppose my *Java* and *Palambang* Prize money will be equal to 5,000*l.*; indeed it ought to be near twice that sum; the sale of my Stock in Trade in *Meerut*, Houses, Wines, Plate, &c. &c. stands me in about 7,000*l.* sterling; Jewels to the amount of 1,200*l.* sterling, as also, in the care of Captain *Fortune* at *Lucknow*, 500*l.* sterling; a Necklace at Mr. *Alexander's* worth 250*l.* sterling, should it turn out to be equal to what I calculate upon, exclusive of 12,000*l.* lent to Mr. *Alexander* for five years and the other Property of mine in his hands that will cover my above-mentioned Behests. I bequeath a sufficient Sum to my Daughter *Selina Gillespie* as to yield her a clear 600*l.* sterling per annum; the remainder, except 500*l.* I bequeath to *Eugenie Pechier*, I leave to Captain *R. Houghton* of *Belfast, Ireland*, and to his Issue by *Jane Gillespie*; and in case my Daughter *Selina Gillespie* should die, I leave the whole of the Sums above mentioned for her use to the said *R. Houghton* and his Heirs by *Jane Gillespie*. I am so ill that I cannot proceed further.—*Meerut*, July 6th, 1814.”

The second was without date, and was in the following words:—

“ I constitute and appoint to be my Executors Sir

William Kier, Major General; Captain *Byers*, Royal Artillery, and Mr. *Joseph Alexander*; as also to be Guardians to my dear *Selina Gillespie*."

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v.
ALEXANDER.

The third was as follows:—

"*Dhoon*, October 30th, 1814. I leave and bequeath to Mrs. *Gillespie*, my Wife, the sum of 300*l.* per annum, for her personal Life; and to my natural Daughter *Selina Gillespie*, now in under the care of Colonel *Caldwell* at *Madras*, the sum of 8,000*l.* to be paid to her on the day of her Marriage, previous to that the Interest to be appropriated to her Education and Board. I request Colonel *Caldwell*, Sir *William Kier* and Mr. *Joseph Alexander* to act as her Guardians and Trustees. I have left a Memorandum leaving to Mrs. *Mary Ann Vineall* 1,000*l.*, and Cloaths, Furniture and many things in my Godowns at *Meerut*; I confirm all Items mentioned in that Memorandum. I leave to *Robert Gillespie*, my Son by Mademoiselle *Eugenie Pechier*, of *Port-au-Prince St. Domingo*, and who is now at School at *Mount Airy* or *Mount Pleasant Academy*, near *Philadelphia*, 1,500*l.* sterling; and to his Mother 1,000*l.* sterling; also to my natural Son by *Charlotte Wallen* 500*l.*; should any Prize-money hereafter, for *Java*, turn out advantageously, these Sums and Bequests will be increased in proportion to the extent of my present Property. Should *Selina Gillespie* die before Marriage my Bequest to her will be paid to the eldest Son of *Richard Houghton* and *Jane Gillespie*, my Cousin. The two Children by the *Malay Girls*, to each I leave two thousand Rupees; *Four* and *Leary*, five hundred each."

The fourth was as follows:—

"*Sakrampore*, October 23d, 1814. If any accident

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should happen to me I leave and bequeath *Mary Ann Vineall* 1,000*l.* sterling, which Mr. *Alexander* will be good enough to lay out in the purchase of an Annuity for and during the Life of the said *Mary Ann Vineall*. I also leave and bequeath to her all my Furniture, Cloaths, Linen and Stores in the Godowns, and which will be turned or not into Cash, as the said *Mary Ann Vineall* may be disposed to determine; also a sufficient sum of Money to pay her passage to *Calcutta*, and eventually to *Europe*. I calculate the Stores, Furniture, &c. at 18,000 Rupees."

On the 31st of October 1814, the day after the date of the third Paper, the Testator was killed in Battle. All the Legatees, except *George Gillespie*, survived him.

The Decree directed the *Master* to inquire of what the Testator's personal Estate consisted at the dates of the first and third Papers, and at his decease. The *Master* reported that he was unable to ascertain what the Testator's personal Estate consisted of at the periods before mentioned; that no evidence had been laid before him to satisfy him that any accession was made to the Testator's personal Estate between the dates of those Papers, or his death; that he was of opinion that no accession was made to such Property between those periods respectively; and that the only valid Legacies given by the Testamentary Papers were those contained in the third Paper and the Memorandum referred to thereby.

To this Report the Defendant *Selina Gillespie* took the following Exception:—

" Because the *Master* ought to have certified that the several Legacies and Provisions given to or mentioned

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to be intended for the Defendant *Selina Gillespie*, by the first and third of the Testamentary Papers, were, and ought to be considered as separate and distinct Legacies to or Provisions for her, and that she was therefore entitled, under the first of the said Testamentary Papers, to a contingent Legacy of 12,000*l.* payable in the event and on the condition therein mentioned, or otherwise; and, in the event of the same not taking effect as therein mentioned, then to the Legacy of 5,000*l.* only, payable as explained therein, subject however, as to the said sum of 12,000*l.*, in the event of the same becoming payable, to the payment out of the Interest thereof of an Annuity of 250*l.* during the life of the Plaintiff, Dame *Annabella Gillespie*; and that *Selina Gillespie* was also entitled, under the first Testamentary Paper, to such a sum of Money as should be sufficient, at the time of payment thereof, to produce a clear yearly sum of 600*l.* per annum by way of Interest thereupon; and that, in addition thereto, the said Defendant *Selina Gillespie* was also entitled, under the third Testamentary Paper, to the Sum of 8,000*l.* so as aforesaid reported due to her, with Interest for the same as therein mentioned; and subject also to such contingent increase thereof in proportion to the amount of the *Java* Prize-money, as by the third Testamentary Paper mentioned as to all the Bequests thereby given."

Mr. *Hart* and Mr. *Merivale* in support of the Exception :—

We admit that the Legacies of 12,000*l.*, and 600*l.* a year, can not be cumulative.

The Rule is quite clear, that Legacies of different amounts, whether given by the same Instrument or by

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different ones, are cumulative, unless some reason appears on the face of the Instrument for their being substitutional. There is no Case in which such Legacies have been considered substitutional, unless there have been circumstances in the Instruments from which an intention that they should be so considered might be collected: such circumstances are not to be found in this Case.

The Legacies given to *Selina Gillespie*, by the first and fourth Papers, differ from each other in the following particulars:—The Legacy given to her by the latter is less than that given to her by the former; and, according to every rule of construction, a smaller Legacy cannot be a satisfaction of the greater one. One is given conditionally, and the other, absolutely. There is nothing in the fourth Instrument that refers to the Legacy given by the first.

As this is a latent ambiguity, the amount of the Testator's property at the time he made these Instruments may be taken into account in construing them. It is clear, from that Clause in the Will which begins, "As I am not clear how my Property may turn out," that the Testator intended to dispose of the whole of his property, and considered that the Legacies he had given would exhaust the whole of it. Now he estimates his property to be worth 28,784*l.* at the least; the Legacies given by the two Papers amount to 31,095*l.* if those which are of the same amount in both Instruments, are not taken into account; so that there would be a deficiency of 2,311*l.* only. That deficiency is too small to induce the Court to hold that these Legacies are not cumulative, especially as the Testator contemplated an increase of property from his Prize-money.

The Cases cited were *Hurst v. Beach* (a), *Attorney-General v. Harley* (b), and *Attorney-General v. Grote* (c).

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Mr. Sugden, Mr. Treslove, Mr. Skirrow, Mr. Romilly, and Mr. Stephenson appeared for the other Parties.

The VICE-CHANCELLOR:—

There is so much inaccuracy in the expressions of the two Instruments of the 6th of July 1814 and the 30th October 1814, that no Court can with confidence say it can arrive at the true intention of this Testator. I am, however, clearly of opinion that the Paper of the 30th October 1814 is, as far as regards the pecuniary Legatees therein named, but not further, a substitution for the first Paper of the 6th of July 1814, and that such Legatees can only claim under the Paper of the 30th of October 1814; and I must therefore over-rule the exception taken on the part of the Infant Daughter. Every Legatee named in the first Paper is again named in the other, except *George Gillespie*, who appears by the Master's Report to have been then dead; and in several instances the amount of the Legacies is the same as in the first Paper.

The two great difficulties in the Cause are as to the meaning of the Testator with respect to the increase of his Legacies in case the *Java* Prize-money should turn out advantageously, and as to what is to become of his residuary Estate. When he says that the Legacies are to be increased if the Prize-money turn out advantageously, he must have had in his mind some estimate of the amount of the Prize-money; and refer-

(a) 5 Madd. 351. (b) 4 Madd. 263. (c) 3 Mer. 316.

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ring to the first Testamentary Paper, where the Prize-money is estimated at 5,000*l.* with a strong expression of hope that it may exceed that Sum, I must infer that he had that idea in his mind at the writing of the Paper of the 30th of October; and the true meaning of the expression in question is, that if the *Java* Prize-money shall exceed 5,000*l.* then the several Legacies before given by that Paper shall be increased proportionably, with respect to his residuary Estate. I take it that, in the estimate which he makes of his property in his first Testamentary Paper, he means to express that the several items of property enumerated, exclusive of the 12,000*l.* lent to Mr. *Alexander*, but inclusive of the Testator's other property in Mr. *Alexander's* hands, will cover the several Legacies which he had thereinbefore given. Those Legacies, as I compute them, amount to 16,000*l.* and the enumerated property to 13,950*l.* according to the Testator's Estimate. The property in Mr. *Alexander's* hands, exclusive of the 12,000*l.*, appears to have turned out to be 2,834*l.*, and this Sum with the 13,950*l.* would, as the Testator expresses it, cover his Bequests thereinbefore mentioned. In such case he increases the provision for his Daughter to 600*l.* per annum. He then gives 500*l.* to *Eugenie Pechier*, and his residuary Estate to Captain *Houghton* of *Belfast*, and his Issue by *Jane Gillespie*; and in case of the death of his Daughter the provisions for her are to fall into the residue. In the Paper of the 30th October 1814, he gives the provision intended for his Daughter, if she dies before Marriage, to the eldest Son of Captain *Houghton* and *Jane Gillespie*, but says nothing whatever with respect to his residuary Estate in any part of this Paper. Considering therefore the Paper of the 30th of October 1814, not as a total revocation of the first Tes-

tamentary Paper, but as a substitution with respect to **the** Legacies only, it will follow that the disposition of **the** residuary Estate made by the first Paper remains **unaltered**, and that the residuary Estate belongs to **Captain Houghton** and his Issue by *Jane Gillespie* ; and, as **that** family have agreed between themselves with respect **to** this property, it becomes unnecessary to make any **declaration** as to the construction of this Gift.

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Refer it to the *Master* to inquire to what extent the **Estate** of the Testator has been or will be benefitted by **the** *Java* and *Palambang* Prize-money ; and declare that **if** such Prize-money should exceed the sum of 5,000*l.*, **then** that the several Legacies given by the said **Testamentary** Paper of the 30th of October 1814, other than the **Legacies** to the two *Malay* Girls and to *Four* and *Leary*, **are** to be increased proportionably by such excess ; and **let** the *Master* proportion such excess between the said **several** Legatees ; and declare that the residuary **Estate** **of** the said Testator, after payment of his Debts and **Legacies**, belongs to the said Defendant *Richard Houghton* and his Issue by *Jane Gillespie*.

COOKE v. SOLTAU.

1824.
15th December.

Title.
Presumption.

A reconveyance of a Mortgage made in 1745, but not afterwards mentioned in the Title Deeds, ought to be presumed, where no demand of either Principal or Interest has been made for several years, and the Mortgage Deeds have been long in the possession of the Owner and his Ancestors.

THE Defendant had agreed to purchase of the Plaintiff some Houses in the City of *London*, but refused to complete his purchase because it did not appear by the Abstract that an old Mortgage had been paid off, or that the legal Estate had been reconveyed. This Suit was accordingly instituted to compel a specific performance of the Agreement; and the question was, whether, under the circumstances of the case, the payment and reconveyance ought to be presumed.

The Facts of the Case were as follows:—

The Plaintiff's Grandfather, being seised in fee of the Houses in question, subject to a Mortgage in fee made in 1733, by his Will, dated the 7th of December 1734, devised all his Messuages, Lands, Tenements and Hereditaments to Dame *Elizabeth Child* and *Richard Lockwood*, and their Heirs, upon Trust to pay one moiety of the Rents and Profits to his Wife *Abigail Cooke* for her Life, and the other moiety to the use and benefit of his Son *John Cooke*, the Plaintiff's late Father, until he should attain the age of twenty-one years, or die; and, after he should attain that age, upon Trust to pay one moiety of the Rents and Profits unto his Son, for his own use, during the joint Lives of the Testator's Son and Wife; but, if his Son should die before his Wife, in Trust for his Wife to receive the whole Rents and Profits of the Premises for her Life, and, after her decease, in Trust to pay all the Rents and Profits to his Son, and

permit him, his Heirs, Executors, Administrators and Assigns to hold and enjoy the Premises. The Will contained a direction that the Executors should retain out of the Premises all such charges and expenses as they should be put unto by reason of the Trusts reposed in them, but did not contain any other charge upon the Testator's real Estates, or any power for the Trustees and Executors to raise Money by Mortgage. The Testator appointed Dame *Elizabeth Child* and *Richard Lockwood* Executrix and Executor of his Will.

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In 1736 the Mortgagees, upon payment of their Mortgage-money, conveyed the Premises to *Elizabeth Child* and *Richard Lockwood*, their Heirs and Assigns.

Richard Lockwood survived *Elizabeth Child*; and, by Indentures of Lease and Release of the 24th and 25th of May 1745, made between him and *Abigail Cooke* of the one part, and *Robert Johnson* of the other part, after reciting the Will, and that *Lockwood*, to enable him to perform several of the Trusts of it, had occasion to borrow 300*l.* upon the security of the Premises, which *Robert Johnson*, at the request of *Abigail Cooke*, had agreed to advance; in consideration of the the 300*l.*, *Lockwood* and *Abigail Cooke* conveyed the Premises to *Robert Johnson*, his Heirs and Assigns, subject to redemption on payment by *Lockwood* and *Abigail Cooke*, or either of them, or the Heirs, Executors or Administrators of the Testator, to *Robert Johnson*, his Executors, Administrators or Assigns, of the 300*l.* and Interest, on the 26th of May 1746.

No further mention was made in the Abstract of this Mortgage, or of any reconveyance or conveyance of the

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premises by the Mortgagee, his Heirs or Assigns. By an Indenture dated the 24th of March 1791, and made between *John Cooke*, the Plaintiff's Father, of the one part, and *William Watson* of the other part, after reciting that *John Cooke*, party thereto, was seised in fee of the Premises, free from incumbrances, he demised the Premises to *Watson* for 1,000 years by way of Mortgage for securing 3,500*l.* with Interest. In this Indenture was contained a Covenant, on the part of *John Cooke*, for the peaceable possession of the Premises free from incumbrances, and the other usual Covenants for Title.

The Plaintiff's Father died about June 1807, intestate, leaving the Plaintiff his eldest Son and Heir-at-Law.

Sometime in the years 1815 or 1816 *Watson* died, having appointed the Rev. *Henry Houson* his Executor. About November 1816, there being then the principal sum of 2,000*l.* due upon the Mortgage to the Estate of *Watson*, and the Plaintiff being required to pay it off, contracted with the Rev. *John Hall Clay* for the sale to him of an Annuity of 180*l.* in consideration of that Sum; and thereupon, by an Indenture dated the 9th of November 1816, and made between the Plaintiff of the first part, *Houson* of the second part, *Clay* of the third part, *Joseph Houson* of the fourth part, and *Richard Grose Burfoot* of the fifth part, in consideration of 2,000*l.* paid by *Clay* to *Henry Houson* in discharge of the Mortgage, the Plaintiff granted out of the Premises an Annuity of 180*l.* to *Clay*. In this Deed *Henry Houson* joined for the purpose of assigning the Term of one thousand years to *Burfoot*, in trust for better securing the Annuity, and subject thereto in trust for the Plaintiff, and to attend the Inheritance.

By Indentures of Lease and Release of the first and second of March 1818, and made between *William Joseph Lockwood* of the one part, and the Plaintiff of the other part, after reciting the death of *Elizabeth Child* in or about the year 1741, and that *Richard Lockwood* departed this life in March 1797 without Issue, leaving his elder Brother the Rev. *Edward Lockwood* his Heir-at-Law, upon whom the legal Trust Estate of the premises devised by the Will of the Plaintiff's Grandfather descended, the same not having passed by the Will of *Richard Lockwood*, and further reciting the death of *Edward Lockwood* having made his Will, but which did not pass the legal Trust Estate, and that *Edward Lockwood* had Issue, *William Joseph Lockwood* his eldest Son, who died in October 1801, leaving *William Joseph Lockwood* his only Son and Heir-at-Law, upon whom the legal Estate of the Premises then descended; and that the Plaintiff being desirous of obtaining a conveyance of such legal Estate had requested *William Joseph Lockwood* to make such conveyance accordingly: *William Joseph Lockwood* conveyed the Premises to the Plaintiff and his Heirs.

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Affidavits had been made by the Plaintiff and *Henry Cooke* his Brother, and the Solicitor employed by *Clay*, of which Copies had been sent by the Plaintiff's Solicitor to the Defendants Solicitors, and by which it appeared that the Title Deeds of the Premises, and, amongst others, the Indentures of the 24th and 25th days of May 1745, had been, a short time previously to the grant of the Annuity, delivered by the Solicitors of *William Watson* to the person who was the Solicitor both of *Henry Houston* and *Clay*. It also appeared by the Affidavits that no payment or demand either of Principal or Interest

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in respect of the Mortgage of the 25th day of May 1745 had been ever made upon Plaintiff or upon his Father. The Plaintiff's Solicitor had searched at Doctors Commons for the Will or Administration of *Robert Johnson*, and had also endeavoured to find out his Heir, but without success.

In an old Abstract made in 1791 (upon the treaty for the loan of the 3,500 *l.*) there was the following Note: "N.B. This 300*l.* and all Interest has been paid off near forty years, if not more, and the present Mr. *Cooke* in quiet possession ever since he attained twenty-one." And the Conveyancer before whom the Abstract was laid, wrote the following opinion on the Title: "Although it does not appear that either the Mortgagee reconveyed the real estate to Mr. *Cooke*, or that the surviving Trustee in his Father's Will conveyed the equity of redemption to him, yet, from the assertion at the foot of the Abstract (to which from my own personal knowledge the greatest credit is due), and as a possessory Action (unless under very particular circumstances indeed) cannot be brought after this lapse of time, I do not think a Mortgagee will run any risque in accepting this Title."

This Abstract, and the note and opinion, had been shewn to the Defendant's Solicitor, and was amongst the Title Deeds delivered by the Solicitors of *William Watson* to the Solicitor of *Henry Houson* and *Clay*.

The Plaintiff submitted that, from these circumstances, it appeared that *Richard Lockwood* and *Abigail Cooke* had no right or power to make the Mortgage except to the extent of the Interest of *Abigail Cooke*, which had long since determined; and that, under the circumstances aforesaid, the Defendant's objection to the Title, on ac-

count of the Mortgage of the 25th of May 1745, was unfounded.

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The Defendant, by his Answer, said that there was not in the Abstract any statement of any Deed, Will or other Document of Title intermediate between the Mortgage Deeds of the 24th and 25th of May 1745, which were indorsed upon certain other Indentures of the 31st of August and 1st of September 1736, and the Mortgage in 1791, and that there was no receipt for the Mortgage-money by the Mortgagee indorsed upon these Deeds, nor any evidence to shew how long such Deeds had been in the possession of the Mortgagor; and, under such circumstances, he submitted that the Heir or Devisee of Robert Johnson, or the other persons in whom his Estate might be vested, were necessary parties to the Conveyance.

Mr Preston and Mr. Sidebottom for the Plaintiff:—

The Mortgage in question was made so long ago as the year 1745. From that time down to the present, a period of nearly eighty years, there is no trace connecting it with Johnson in any shape whatever, nor is any thing heard of his interest. In 1754 the Plaintiff's Father came into possession; and it appears by the Affidavit of Henry Cooke, the Plaintiff's Brother, that he assisted his Father in the management of his affairs for twenty years previous to his decease; and, therefore, if any payment or demand of either Principal or Interest had been made he must have known of it. But he swears he never heard of any demand being made under this Mortgage.

The fact that no Administration can be found to this Mortgage, proves clearly that the Mortgage-money had been satisfied. For if not, some person would have been

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induced to administer to the Mortgagee for the purpose of recovering it. In 1791, previous to making the Mortgage to *Watson*, the Title was investigated, and the opinion of Counsel taken upon it, and he advised that the Security might be accepted. At that time the Deeds of 1745 were found in the hands of the Mortgagor; and we trace him in possession for more than twenty years. If a Mortgagee had filed a Bill for a foreclosure stating circumstances similar to those of the present Case, a Plea or Demurrer would have held good. In two Cases where a Mortgagee stated his Title so as to raise a doubt, the Court has refused relief. *Christophers v. Sparke* (a), and *Blewit v. Thomas* (b). The same doctrine was held by Lord Thurlow in *Trash v. White* (c).

If under the circumstances of this Case this Title is not good, it is impossible to conceive how it can ever be made good. The personal Representative of the Mortgagee could not claim the Money, nor the Heir, the Estate.

If an Action were brought by the Heir-at-Law of the Mortgagee to recover this Estate, there is no Judge who would not direct a Jury to presume a reconveyance of the legal Estate. If the Mortgagee died without an Heir, no Jury would presume an escheat after a possession of seventy years. In *Hillary v. Waller* (d), where there was no adverse possession, a reconveyance was presumed. This Case however falls within the principle of *Emery v. Grocock* (e).

The alleged object for raising the 300*l.*, was to enable the Trustee to perform the Trusts of the Will. But the

(a) 2 J. & W. 228. (b) 2 Ves. Jun. 669.
(c) 3 Bro. C. C. 289. (d) 12 Ves. 239. (e) 6 Madd. 54.

Trustee had no power to mortgage the Estate for any such purpose; and, even with the concurrence of the Tenant for Life, he could only mortgage it for her Life. Under all the circumstances of this Case, and as a period of time has elapsed sufficient to destroy every kind of remedy, we submit that the objection to the Title to these Houses cannot be maintained, and that a specific performance ought to be decreed.

1844.
COOK
v.
SOLTA.

Mr. Sugden and Mr. Pemberton for the Defendant:—

The Case before the Court is not the Case of Mortgagor and Mortgagee, but of Vendor and Purchaser. The doctrine of presumption as between Mortgagor and Mortgagee is one thing, and as between Vendor and Purchaser, another. In the case of Mortgagor and Mortgagee there is not any time in which the possession becomes adverse; for it is the practice for the Mortgagor to remain in possession. A long possession, in order to be a ground for presuming a reconveyance, must be adverse. *Fenwick v. Reed* (f). That Case afterwards went to law, and the Jury were of opinion that there were no grounds for presuming a release of the equity of redemption. If a mesne Incumbrancer were to get a conveyance of the legal Estate, it would be no objection to his availing himself of it, that the Mortgage-money had been paid. As to this Mortgage being made by persons who had no Title to make it, it appears that a Mortgage was originally made by the Testator, and after his death the Mortgagees conveyed the Estate to the Trustees of his Will, and they again mortgage to *Johnson*. So that this is the case of Trustees of the equity of redemption who, having paid off the Mortgage-money, create another Mortgage in fee for the purpose of enabling themselves

(f). 1 Mer. 114.

1824.

COOKE

SOLTAU.

to perform the Trusts of the Will. That objection therefore will not hold. How do the Plaintiffs prove that there was not a Counterpart of the Mortgage Deed? If there were, and it was executed by all parties there is an end to the question. There were no intermediate Deeds executed from 1745 to 1791; so that no aid can be derived from that circumstance. There is no indorsement on the Deed of payment of either Principal or Interest. The Plaintiffs did not choose to investigate the facts of the case in 1791, when they might have done so; but they waited until 1819, when *Richard Lockwood* was dead, and then took a reconveyance from his Heir. At that time the legal Estate was not in the Heir of *Richard Lockwood*, but in the Mortgagee; and, therefore the Reconveyance ought not to have been taken from him but from the Mortgagee. The Plaintiff says that it is unreasonable for the Defendant to require a reconveyance from a person who acquired the legal Estate in 1745, and yet he himself takes a reconveyance from persons whose Interest vested in them in 1734. How can the Plaintiff, with any consistency, insist upon the effect of presumption as against the Defendant, when he takes a reconveyance of a prior Title? *Richard Lockwood*, the surviving Mortgagor, was alive at the date of the Deed of 1791; but he was not made a party to that Deed. This is an admission that at that time the legal Estate was in the Mortgagor. In the year 1818 the Plaintiff takes a reconveyance from the Heir of *Richard Lockwood*. It is clear, therefore, that the reconveyance must have taken place between 1791 and 1818. As to the authorities in regard to presumption there really are none. The Case of *Hillary v. Waller* has not met with the approbation of the profession. And we beg to refer to what was said by the Lord Chancellor in the Case of *Lord Cholmondeley v. Lord Clinton*

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~~In~~ the House of Lords (g). The Case of *Emery v. Grocock* has no application to this; for there the Term ~~was~~ created in 1711, and in 1744 a Settlement was made ~~and~~ a Recovery suffered, and it was therefore impossible ~~for~~ the Settlement to have prevailed if the Portions had ~~not~~ been paid.

1824.

COOKE
v.
SOLTAU.

The VICE-CHANCELLOR :—

I adhere to the principle of *Emery v. Grocock*.

No reconveyance could ever be presumed without the actual production of the Deed, unless it could be properly presumed in this Case.

(g) Sug. Vendors, 425, 6th Edition.

END OF PART I.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

FOLJAMBE v. WILLOUGHBY.

THE Plaintiffs were Infants, and this Suit was instituted for the purpose of having it determined out of which of several Funds provided for the purpose, they were to be maintained and educated.

By a Settlement, dated the 17th of October 1798, made upon the Marriage of *John Savile Foljambe*, certain Real Estates were limited to the use of him for life, with Remainder to the use of Trustees for five hundred years, with Remainder to the first and other Sons of the Marriage in Tail, with the ultimate Remainder to the use of *John Savile Foljambe* in Fee. The Trusts of the term of five hundred years were declared to be that, in case there should be an eldest Son of the Marriage and three or more younger Children, the Trustees should, by Sale or Mortgage, raise the Sum of 5,000*l.* to be divided among the younger Children, in such Shares as

1824.
4th Nov.

Infant.
Maintenance.

Where there are several Funds provided by different Persons for the Maintenance of Infants, the Interest of the Infants must alone determine which of the Funds is first applicable.

1824.

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WILLOUGHBY.

the Father should appoint; and, in default of appointment, equally; the Portions of Sons to be payable at twenty-one, or sooner, if the Trustees, after the death of the Father, should think proper, for their advancement; and the Portions of Daughters, at twenty-one or Marriage, with benefit of Survivorship in case any of the Children died before their Shares became payable; and, after the death of *John Savile Foljambe*, to raise, for the Maintenance of the younger Children, till their Portions should become payable, such sums of Money as the Trustees should think necessary, not exceeding the Interest of their Portions at the rate of four per cent per annum.

John Savile Foljambe, by his Will, after ratifying the Settlement and giving divers pecuniary and specific Legacies, bequeathed all the residue of his Personal Estate to Trustees, upon Trust to pay, assign and transfer it unto and equally amongst all his younger Children who should be living at the time of his decease, or be born in due time afterwards, Share and Share alike, the Shares of Sons to be paid at twenty-one, and of Daughters, at twenty-one or Marriage; and, in the mean time, the Dividends and Interest to be applied by the Trustees, at their discretion, towards their Maintenance and Education.

John Savile Foljambe died in 1805, soon after the date of his Will, leaving Issue of the Marriage four Children, of whom the three youngest were Infants, and were the Plaintiffs in this Suit.

After his death, his Father, *Francis Ferrand Foljambe*, who was also a Party to the Settlement, made his Will, dated in 1813, and by it devised certain Real Estates to

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Trustees for a term of two hundred years, upon Trust to
~~a~~pply a sufficient part of the Rents and Profits, at their
~~d~~iscretion, for and towards the Maintenance and Edu-
~~c~~ation of his four Grandchildren, the Children of his late
~~S~~on *John Savile Foljambe*, during their Minorities, in
~~s~~uch proportions and manner as the Trustees should, in
~~t~~heir discretion, think most advisable; and also upon
~~T~~rust, subject to the payment of certain Debts and Lega-
~~c~~ies to the Plaintiffs and other Persons, and also to the
~~M~~aintenance of the Infants, to permit the Person entitled
~~F~~or the time being to the Estate in Remainder imme-
~~d~~iately expectant on the Term, to receive the Rents
~~a~~nd Profits.

1824.

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WILLOUGH

Francis Ferrand Foljambe died soon after the date of
his Will.

After the death of *John Savile Foljambe*, and until
the death of *Francis Ferrand Foljambe*, the Trustees and
Testamentary Guardians of the Plaintiffs received the
Interest of their Portions under the Settlement, and ap-
plied it, together with the Interest of the Residuary Per-
sonal Estate of *John Savile Foljambe*, in the Maintenance
and Education of the Plaintiffs.

The only Fortunes to which the Plaintiffs were enti-
tled were the Legacies of 5,000 *l.* each under the Will of
their Grandfather, and the provision made for them by
the Settlement and Will of their Father. *George Savile
Foljambe*, the eldest Son, was entitled to very large
Estates, which yielded him a yearly income of above
14,000 *l.*

The Bill, after stating these circumstances, charged
that the Grandfather of the Plaintiffs intended that their

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WILLOUGHBY.

Maintenance should be provided for under the Trusts of the term of two hundred years created by his Will, and that the provision made for them by the Settlement, and by their Father's Will, should accumulate for their benefit; and that they had accordingly, since the death of their Grandfather, been wholly maintained under the Trusts of the two hundred years term. It also stated that no account had ever been taken of the Estate of their Father, nor of the accumulations of it since the death of their Grandfather; and that, in November 1822, the eldest of the Plaintiffs attained the age of twenty-one years, and became entitled thereupon to have one third part of her Father's Residuary Personal Estate, and the accumulations thereof, and of her Portion under the Settlement, paid to her; but that the Defendants, the Trustees, refused to pay them to her, on the ground that these Funds were to be considered as first applicable for her Maintenance. It prayed that the Rights and Interests of the Plaintiffs, and of *George Savile Foljambe*, their eldest Brother, might be ascertained and declared, and proper Accounts be taken for that purpose.

The eldest Son, by his Answer, insisted that the income of the Residuary Personal Estate of *John Savile Foljambe*, his Father, was first applicable for the Maintenance of the Plaintiffs.

The Cause now came on to be heard.

Mr. *Heald*, and Mr. *Teed*, for the Plaintiffs, contended that, according to the general principle on which the Court acts towards Infants, the Funds must be applicable in the manner most beneficial to them; and, therefore, that the provision made for the Maintenance of the Plaintiffs by their Grandfather, must be first applied,

otherwise they would not have the full benefit of that provision; and they cited *Rawlins v. Goldfrap* (a).

1824.

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WILLOUGHBY.

Mr. Bell, for *George Savile Foljambe*, the eldest Son, argued that the Fund provided by the Will of the Father, must be first applied; and that the provision made by the Grandfather's Will, was only in aid of that Fund.

The VICE-CHANCELLOR:—

The Will of *Francis Ferrand Foljambe* has no manner of reference either to the Settlement or Will of *John Savile Foljambe*. It gives to the Children of *John Savile Foljambe* an absolute independent right to call for Maintenance from his Estate.

Where there are two Funds absolutely given by different Persons for the Maintenance of an Infant, the interest of the Infant must determine which of the two Funds is to be applied.

Declare that the Trustees of the term of two hundred Years created by the Will of *Francis Ferrand Foljambe*, are bound to supply a sufficient part of the Rents and Profits of the Trust Estate for the Maintenance and Education of the Children of *John Savile Foljambe*; and, if the Parties require it, refer it to the Master to inquire what would be proper to be allowed in that respect.

(a) 5 Ves. 440.

1824.
5th, 7th & 10th
December.

*Receivers'
Accounts.
Practice.*

SHEWELL v. JONES.

THE Bill in this Case was filed for the dissolution of a Partnership between the Plaintiff and the Defendant.

A *Master's* Report of a Receiver's Account, like his Report on Taxation of Costs, does not require confirmation, and cannot be excepted to. But the Court will enter into the consideration of objections to the general principle on which the *Master* has proceeded in taking a Receiver's Account, but not of objections to particular Items of it.

By an Order made in the Cause, by consent, the Partnership was declared to be dissolved, and it was referred to the *Master* to appoint a proper Person to collect and pay the Debts due to and from the Partnership, and to wind up its concerns; and it was directed that the Person so to be appointed should pass his Accounts before the *Master*.

The Receiver's Accounts were accordingly passed before the *Master*, who reported a certain balance to be due from him.

The Defendant then presented a Petition, stating that the *Master* had improperly allowed many sums, which were particularized in five Schedules annexed to the Petition, and also that the *Master* had refused to permit the Petitioner to exhibit Interrogatories for the examination of the Receiver, and of Witnesses to substantiate his objections. The Petition therefore prayed that the *Master* might review his Report, having regard to the objections taken by the Petitioner; that certain Items might be expunged from the Account; and that the Defendant might be at liberty to exhibit Interrogatories for the examination of the Receiver and Witnesses.

Mr. Sugden, upon opening the Petition, stated that he was informed that the *Master* had considered that he

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Had no jurisdiction to enter into some of the Petitioner's objections to the Account, and had therefore declined to do so.

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SHAWELL

v.

JONES.

Mr. Heald, and Mr. Bickersteth, for the Receiver.

Mr. Treslove, for the Plaintiff.

The Vice-Chancellor said that he had applied to the Master, who certified to him that he had entered into and fully considered the Petitioner's objections; and, further, that the Petitioner had, in an early stage of the proceeding before him, obtained an order to examine the Receiver upon Interrogatories, and had accordingly proceeded to such Examination as fully as he thought fit; and that, at the close of the business, the Petitioner having desired to exhibit new Interrogatories for the further Examination of the Receiver, the Master had been of opinion that he could not admit them; and that, as to Witnesses, the Parties had proceeded before him by Affidavit; and it was not until the close of the business that the Petitioner had proposed to exhibit Interrogatories for the Examination of Witnesses, which the Master had refused doubting whether he had power under an Interlocutory Order, without special words, to send such Interrogatories to the Examiner; and being of opinion that, if he had such power, it was too late in the Proceedings to admit them.

7th Dec.

Mr. Sugden, and Mr. Knight, for the Petitioner, were then proceeding to support the objections to the Account, but were stopped by the Vice-Chancellor, who said that it was the first time he had heard of objections to a Master's allowance of a Receiver's Account being brought before the Court; and he apprehended that such a proceeding was not warranted by the Practice of the Court.

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JONES.

10th Dec.

The Petition was therefore directed to stand over, that the Practice might be inquired into.

THE VICE-CHANCELLOR, delivered Judgment on this day to the following effect :—

Upon the opening of this Petition, it appeared to me to be altogether novel, and I could not consider it to be justified by the Practice of the Court, because of the great inconvenience which would be the consequence of permitting any dissatisfied Party to call upon the Court to review every Item of a Receiver's Account.

The *Master's* Report of a Receiver's Account, does not require confirmation, and does not admit therefore of exceptions. In this respect it resembles the *Master's* Report upon the Taxation of Costs; and the proceeding with respect to Costs, affords, by analogy, a safe rule to be applied to this subject. In ordinary cases, the *Master's* Report upon the subject of Costs, is final. But if it be thought that the *Master* has in the Taxation adopted some general Principle which cannot be supported, the Party complaining is entitled to bring that point before the Court; and Petitions of this nature are not unfrequent in Practice.

The same rule is, for the same reason, to be applied to the case of Receivers' Accounts. The Court will not enter into the consideration of any Items of the Account, but will, upon the Petition of the Party complaining, examine any principle upon which the *Master* has proceeded, where error is imputed to him.

The present Petition does not make such a case; and although it was suggested, at the Bar, that the *Master* had declined to enter into the merits of some

of the Petitioner's objections, upon a supposed want of Jurisdiction, which would have been the proper subject of an appeal to the Court, yet, upon reference to the *Master*, he informs the Court that such suggestion is mistaken, and that he did fully enter into the merits of every objection taken by the Petitioner.

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—
SHEWELL
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JONES.

With respect to the complaint, that the *Master* refused to permit the Petitioner to exhibit Interrogatories for the Examination of the Receiver and Witnesses, it now appears that the Petitioner did fully examine the Receiver upon Interrogatories, and that the *Master* refused a second Examination at the close of the business; and that the *Master*, doubting whether he had Jurisdiction to examine Witnesses at all upon Interrogatories, was of opinion that it was at all events too late to enter into that Examination when the request was made by the Petitioner.

I concur with the *Master* in both these points. The Petition must therefore be dismissed; and I cannot refuse the Receiver his Costs.

1824.
11th Dec.

Settlement.
Construction.
Election.

HUME v. RUNDELL.

By the Settlement on the Marriage of J. H. with C. R. Portions were to be raised for the younger Children of J. H. by C. R. or any future Wife, but not to be paid until after the decease of J. H., C. R., or such future Wife, though no Estate was given to such future Wife; and power was given to J. H. to appoint the Interest of the Portions to be raised for the Childrens Maintenance; and on his default the same power was given to the Trustees, and the Main-

tenance was directed to be paid on the first quarter-day after the decease of the Survivor of J. H., C. R., or such future Wife. J. H. died, leaving his second Wife surviving, and by his Will, which was not duly attested, directed the Maintenance to be raised from the time of his death, and gave other benefits to his eldest Son: Held, that the Trustees had no power to allow Maintenance during the second Wife's lifetime; but that the eldest Son should be put to his election, as he had other benefits under the Will, and was the only Party that could be benefitted by withholding the Maintenance.

ONE of the questions in this Cause was, whether Catherine Ann Hume, one of the Daughters of James John Hume, was entitled to receive any part of the Interest of her Portion for her Maintenance, before the Principal was payable.

By the Settlement on the Marriage of James John Hume with Catherine Randolph, the Manor of Barwick Hall, in Essex, was limited to the use of Trustees for five hundred years, in Remainder expectant upon the decease of the Survivor of James John Hume and Catherine Randolph, upon Trust, if there should be any Children of James John Hume by Catherine Randolph, or by any after-taken Wife, other than an eldest or only Son, then, after the decease of the Survivor of James John Hume and Catherine Randolph, or in the life-time of them, or the Survivor of them, if they, he or she, or any such future Wife, should so direct, to raise by the usual means 5,000 l. for the Portions of such Children, that sum to be a vested Interest, and to be paid to them at such ages, in such manner, shares and proportions as James John Hume should by Deed, or by his Will, to be signed and published by him, and attested as therein mentioned, direct; and, in default of such direction, the 5,000 l. to be divided amongst the Children in equal

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tioned; and the first of the said quarterly Payments to be made on such of those days as should happen next after the decease of the Survivor of *James John Hume* and *Catherine Randolph*, or such future Wife as aforesaid. Subject to this term, the Manor was limited to the use of the first and other Sons of *James John Hume*, by *Catherine Randolph*, successively, in tail male, with Remainder to his first and other Sons by any after-taken Wife, successively in tail male.

James John Hume, by his Will, after reciting the Settlement, and the Power thereby reserved to him of appointing the 5,000*l.* and that there was Issue of his Marriage with his late Wife *Catherine*, one Child, *Catherine Ann Hume*, and, of his Marriage with his then Wife *Lydia*, *William Edward Hume*, *John Lloyd Hume*, *Caroline Mary Hume*, and *Henry Hume*, in exercise of the Power, appointed 4,000*l.* part of the 5,000*l.* in trust for *Catherine Ann Hume*, her Executors, Administrators and Assigns, and to become an Interest vested in her when she should attain the age of twenty-one years, or be married under that age with the consent of her Guardians; and the sum of 1,000*l.* the residue of the 5,000*l.* in trust for *John Lloyd Hume*, *Caroline Mary Hume*, and *Henry Hume*, in equal Shares; and the same to become an Interest vested in such Children, at such and the same ages, days or times as were expressed in the Settlement concerning the Shares thereby intended and provided for his Children by his late Wife, *Catherine*, or any after-taken Wife; and he thereby further directed that the yearly Dividends and annual Produce of the respective Shares of his Children in the 5,000*l.* should, until such Shares should, under the Settlement or his Will, become an Interest vested in them, be applied for their Maintenance and Education;

and he gave a Copyhold Estate, and certain parts of his Personal Estate, to his eldest Son, *William Edward Hume*.

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Mr. *Heald*, and Mr. *Wheatley*, for the Plaintiff,
Catherine Ann Hume.

Mr. *Sugden*, and Mr. *Beames*, for the Defendant,
William Edward Hume.

Mr. *Barber*, for the Trustees.

The VICE-CHANCELLOR :—

The question is, whether it be the true construction of this Settlement that the Trustees of the term for raising Portions for younger Children have authority, until such Portions become payable, to levy and raise annually, for their Maintenance and Education, Sums not exceeding the interest of their Portions.

In the construction of all Instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole Instrument taken together. But a Court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the Instrument, expressions which manifest that the Author of the Instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it be plainly controlled by other parts of the Instrument.

To apply these principles to the present Case :

It cannot but be considered as so unreasonable that the Plaintiff should, under the actual circumstances, be without any provision for her Maintenance and Education during the life of her Stepmother, that it is diffi-

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ought to believe that such was the intention of the Settlement made on the first Marriage; and, if the Court could act upon conjecture, it would declare against such intention. But such intention being clearly and unequivocally expressed in the clause of Maintenance, and there being no expressions in any other part of the Settlement which manifest a different intention in this respect, I feel myself bound to declare that the Trustees under the Settlement have no authority, during the infancy of the Plaintiff and the life of the Stepmother, to raise any provision for the Plaintiff's Maintenance.

If this Case had come before the Court upon a Bill to reform the Settlement upon the ground of mistake in the drawer of the Instrument, it seems highly probable that evidence might have been found which would have justified a Decree in favour of the Plaintiff.

There appears to me, however, to be another view of this Case, which has not been suggested at the Bar, which may secure Maintenance to the Plaintiff wholly or in part. The Father's Will expressly gives it to her; and, though he had no power to do so under the Settlement, yet his Will may effect his purpose by way of election: Although the two Testamentary Instruments will not pass Freehold Estates, they will certainly pass Copyhold Estate and Personal Property. Upon looking through the first Testamentary Instrument it will be found that the Testator gives to his eldest Son, who will alone benefit by the withholding of Maintenance from the Plaintiff, an Interest in Copyhold and in Personal Property; and the eldest Son cannot take under the Will without confirming the Will. There must, therefore, be a reference to the *Master* to see whether it is for his benefit to elect to take under or against the Will.

LONG v. RICKETTS.

1824.
13th Dec.

*Devise.
Restraint of
Marriage.*

SAMUEL LONG, by his Will, dated in May 1801, devised certain Real Estates to his Wife, for her life, and, after her decease, to *John Vizard* and *James Ricketts*, their Heirs and Assigns, upon Trust, as long as his Son *John Long* should continue unmarried, to demise the Estates, and receive the Rents and Profits thereof, and pay the same to *John Long*; and in case of his Marriage with the consent of *Vizard* and *Ricketts*, or the Survivor of them, or his Heirs, (save as to his marrying *Elizabeth Warner*,) then in Trust to convey the Estates to him, his Heirs and Assigns; but in case he should marry *Elizabeth Warner*, either with or without the consent of his Trustees, or should marry any other Woman against the consent of them or the Survivor of them or his Heirs, then in Trust to convey the same Estates to his Son, *Samuel Long*, his Heirs, Executors, Administrators and Assigns; and then, in lieu of those Estates, he gave to his Son *John* the Sum of 200*l.* to be paid to him by *Samuel* out of the Estate, which he thereby charged with the payment thereof accordingly, and directed it to be paid six months after *Samuel*, his Heirs, Administrators or Assigns should become entitled to the Estates.

Devise of an Estate to Trustees, upon Trust to pay the Rents and Profits to the Testator's Son *J.* while unmarried, and to convey to him, in case of his Marriage with the consent of the Trustees; but in case he should marry against their consent, then to sell the Estate and divide the proceeds among other persons. The Son having married without the knowledge of the Trustees, both of whom disapproved of the Marriage when they were informed of it; held that, the Marriage having been had without the consent of the Trustees,

The Testator by a Codicil, after reciting that his Son *Samuel Long* was lately dead, declared, that in case his Son *John* should intermarry with *Elizabeth Warner*, either with or without the consent of the Trustees, or the Survivor of them, or his Heirs, or should marry any other Woman against their consent, or the consent of

though not against their consent, the Devise over took effect.

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the Survivor of them, or his Heirs, then he gave his Estates, after the death of his Wife and the marrying of his Son *John* contrary to his wish and the conditions expressed in his Codicil and Will, to the Trustees, their Heirs, Executors and Assigns, upon Trust to sell the same, and to stand possessed of the Money to be thereby produced, upon Trust to divide it among certain other Persons named in the Codicil.

The Testator died in 1804. In 1805 his Son *John* intermarried with *Sarah Picton*, who had lived with the Testator as a Servant, but had left his service some time before his death; but he did not, prior to his Marriage, communicate his intention to either of the Trustees, and the Marriage took place without their knowledge; but as soon as they heard of it, they expressed their disapprobation of it.

Vizard died in January 1814. In April following, *Ricketts* served the following Notice upon *John Long*.

“ I hereby give you notice that your Marriage with your present Wife, *Sarah Long*, late *Sarah Picton*, was against my consent and approbation, and against the consent and approbation of *John Vizard*, deceased, my Co-Trustee named in the last Will and Testament and Codicil of your late Father *Samuel Long*; and that, in consequence of such your Marriage with your said Wife, I consider the Messuage, Lands, &c. from and after the decease of your Mother, liable to be sold and disposed of and converted into Money, and the Produce arising therefrom to be paid and applied to and among the several Persons, and upon the several Trusts and Purposes mentioned, declared and expressed in the Will and Codicil of your late Father.”

In 1818 *John Long* died, leaving *Sarah Long*, his Widow, and several Children by her surviving him.

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v.
RICKETTS.

The Bill was filed against *J. Long's* Children and Personal Representative, by the Persons to whom the Estate was given, by the Codicil, on the Marriage of *John Long* without the consent of the Trustees. It prayed that the Estates might be sold, and the Produce distributed amongst the Plaintiffs.

When the Cause was heard, the *Vice-Chancellor* referred it to the *Master* to inquire whether *John Long* married *Sarah Picton* with the consent of the Trustees, or either of them; and whether they, or either of them, were acquainted with the fact of the intended Marriage before it took place; and whether they, or either of them, approved or disapproved of such intended Marriage: and, if he should find that the Trustees, or either of them, were or was not acquainted therewith before it took place, then to inquire when they became respectively acquainted with the fact of the Marriage; and whether, after becoming acquainted therewith respectively, they approved or disapproved of the same, and when, and under what circumstances.

The *Master* reported that *John Long* did not marry *Sarah Picton* with the consent of the Trustees, and that they or either of them were not acquainted with the fact of the Marriage before it took place; that no Evidence had been laid before him to enable him to ascertain when the Trustees respectively became acquainted with the fact of the Marriage; but, that when they did become acquainted with it, *Ricketts* disapproved of it, because *Sarah Picton* was in a humbler sphere of life than *John Long*; but that no Evidence had been laid before him to

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show when *Ricketts* first disapproved of the Marriage, or that *Vizard* ever disapproved of it.

The Cause now came on to be heard for further directions.

Mr. *Bell*, and Mr. *Koe*, for the Plaintiffs :—

The consent of the Trustees to the Marriage of *John Long*, is a Condition precedent; and, if it has not been complied with, no Estate became vested in him. It is quite clear, upon the *Master's* Report, that the Condition was not performed. A difference has been taken between Real and Personal Estate, as to the force and efficacy of such Conditions; but there can be no doubt that they are effectual as to Real Estate. *Scott v. Tyler* (a); *Mansell v. Mansell* (b); *Fry v. Porter* (c); *Stackpole v. Beaumont* (d); *Harvey v. Aston* (e); *Clarke v. Parker* (f).

Mr. *Combe* for the Trustees.

Mr. *Heald* and Mr. *Twiss*, for the Children of *John Long* :—

The Testator does not exclude *John Long*, in case he lived and died a Bachelor; but only devises the Estate over in case of his Marriage against the consent of the Trustees. It is not therefore quite correct to describe this as a Condition precedent. By the Codicil, the Trustees have no power to sell the Estate, unless *John Long* married against their consent. The doctrine of Conditions does not apply to such a case as the present. *Boraston's Case* (g); *Hook v. Taylor* (h). This Case

(a) 2 Bro. C. C. 431.

(b) Cited in *Scott v. Tyler*, 2 Bro. C. C. 473; also in 2 Dick. 712.

(c) 1 Mod. 300. (d) 3 Ves. 98. (e) 1 Atk. 361.

(f) 19 Ves. 1. (g) 3 Rep. 19. (h) 2 Vern. 561.

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is distinguished from others, by there being no direct Devise over in case of a Marriage against the consent required.

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v.

RICKETTS.

The VICE-CHANCELLOR :—

In this Case, to entitle himself to the Estate after Marriage, *John Long* must marry with the consent of the Trustees; and he has not performed that Condition precedent.

To make the Will consistent, the word "against" here must be read in the sense of "without."

AMHURST v. KING.

1825.

17th Jan.

Pleading.

Answer.

THE Defendant, to several statements in the Bill as to transactions to which he was not, nor was alleged to be, privy, answered in the following form: "And this Defendant further answering saith it may be true, for any thing this Defendant knows to the contrary, that, &c.;" and, after going through the several statements, he concluded thus: "But this Defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same."

An Answer as to Matters to which the Defendant was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a Stranger to, and could not form any belief respecting them, is sufficient.

The Plaintiff excepted to this part of the Answer; and the Master having overruled the Exception, he excepted to the Master's Report. Upon the hearing of the Exception, Mr. Koe, for the Plaintiff, contended that the Defendant ought to have answered as to his information as well as as to his belief, according to the requisition of the Bill. But the Vice-Chancellor was of opinion that

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the Defendant, in stating himself to be an utter stranger to all and every the matters in question, did answer as to his information, and did, in effect, deny that he had any information respecting them.

Exception overruled.

17th Jan.

*Pleading.
Parties.*

DOUGLAS v. HORSFALL.

Demurrer allowed to a Bill for the specific performance of an Agreement for a Lease entered into by the Trustees of a numerous Company for the use of the Company, because none of the Members of the Company were Parties to the Bill.

THE Bill prayed for a specific performance of an Agreement for a Lease made by the Plaintiffs with the Defendant. It stated that the Plaintiffs were Trustees for the Portable Gas Company: that that Company consisted of a great number of persons: that the Plaintiffs, by *Yelloly* their Agent, entered into the Agreement for the use of the Company: that a Draft of the Lease was delivered to the Plaintiffs' Solicitor, with Blanks left for the Names of the Lessees; and that the Solicitor filled up the Blanks with the Names of the Plaintiffs: but it did not state that the Plaintiffs were Members of the Company, nor were any of the Members made Parties to the Suit; and, under those circumstances, the Defendant demurred to the Bill.

Mr. *Heald*, and Mr. *Spence*, for the Plaintiffs:—

It was not necessary to make any of the Members of the Company Parties to this Bill, because the Plaintiffs were to be the only Lessees. There was no privity between them and the Company. *Yelloly* was their Agent, and not the Agent of the Company. The Blanks in the Draft were filled up with the Names of the Plaintiffs, therefore it was a complete Agreement for a Lease to them, not as Trustees, but in their individual capacities.

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The Company could not object to the Lease being granted to the Plaintiffs, but they might have said they would not be bound by a Lease to which they were not Parties. In *Cullen v. The Duke of Queensberry* (a), the Court acted upon an Agreement of this nature, where the Persons who entered in it were the only Parties to the Suit.

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DOUGLAS
v.
HORSFALL.

THE VICE-CHANCELLOR:—

The object in that Suit was merely to obtain Payment of a Sum of Money; the Defendants were left to obtain contribution as they could.

Mr. Horne, for the Demurrer, said that a Trustee could not file a Bill respecting the Trust Property without making the *cestui que trust* a Party: and that here, the Society being so numerous that it was not practicable to make all the Members Parties, the Bill ought to have been filed by some of them on behalf of themselves and the others; but that it did not appear by the Bill that the Plaintiffs were even Members of the Society; and on these grounds the *Vice-Chancellor* allowed the Demurrer.

(a) 1 Bro. C. C. 101.

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24th Jan.

BIRD v. BRANCKER.

Practice.

It is not irregular for the Defendant's Solicitor to be one of the Commissioners for taking the Answer.

THE Plaintiff moved that the Answer of the Defendant might be taken off the File, because the Solicitor of the Defendant had been one of the Commissioners to take the Answer.

Mr. *Agar*, and Mr. *Kindersley*, in support of the Motion, said that they had not been able to find any Authority directly in point; but that the Principle upon which Affidavits were not allowed to be sworn before the Solicitors of the persons making them, was applicable, and that, if the Practice objected to were allowed to prevail, a Solicitor, knowing that the Answer contained what was untrue, might administer the Oath improperly.

Mr. *Horne* opposed the Motion.

On the following day, the *Vice-Chancellor* read in Court a Certificate, signed by several Clerks in Court, stating it to be the Practice that the Solicitor of a Defendant might be a Commissioner to take his Answer; and the Motion was refused.

24th Jan.

Injunction.
Notice of Trial.

Giving a Notice of Trial is a breach of an Injunction to stay Trial.

In the same Cause the Plaintiff moved that the Solicitor of the Defendant might be committed for a Contempt, in giving a Notice of Trial after an Injunction had been obtained to stay Trial. There was added to the Notice, that it was to be considered as nugatory, unless the Injunction should be dissolved previous to the day of Trial.

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Mr. *Horne* supported the Motion.

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Mr. *Agar* and Mr. *Kindersley* opposed it.

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They said that, if a Notice of Trial might be given pending the Injunction to restrain the Trial, the Plaintiff would be compelled to have his Witnesses ready, and the Court might ultimately be of opinion that the Injunction ought to be continued, and that taking a step that was preliminary to doing the act restrained, was as much a breach of the Injunction as doing the act itself.

The *Vice-Chancellor* stated that the Plaintiff in Equity, not being compelled to go to Trial before he had seen the Defendant's Answer, it was not reasonable that he should be compelled to prepare for Trial before he had seen the Answer. And, the next day, he stated that it was the opinion of the most experienced Officers of the Court, that a Notice of Trial was a breach of the Injunction to stay Trial. The Defendant was ordered to withdraw the Notice of Trial, and to pay the Costs of the Motion.

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Subpœna.
Defendant.

Ordered that a Defendant, a Female Infant not baptized, should be described in the Subpœna as the youngest Female Child of her Father and Mother.

ELEY v. BROUGHTON.

A FEMALE Infant, who was born pending the Suit, was a necessary Party to the Suit, and her Parents, in order to interpose difficulties in the way of prosecuting the Suit, had refused to have her baptized. The Question was, how she was to be described in the Subpœna to appear and answer.

The *Vice-Chancellor*, on the Motion of Mr. *Pemberton*, ordered, that the Infant should be described as the youngest Female Child of her Father and Mother.

24th Jan.

Foreclosure.
Bankrupt.

Where a Mortgagee becomes Bankrupt, and a Bill of Foreclosure is filed against him and his Assignees, the Court will not, on the application of the Assignees alone, make an immediate Decree under 7 Geo. 2. c. 20.

GARTH v. THOMAS.

THIS was a Bill of Foreclosure. After the Suit was commenced, the Defendant, the Mortgagor, became Bankrupt. A Supplemental Bill was then filed against his Assignees. They now moved for an immediate Decree, under the 7th Geo. 2, c. 20, s. 2 (a).

(a) This Section is as follows: "And be it further Enacted, by the Authority aforesaid, that, from and after the said first day of Easter Term 1734, where any Bill or Bills, Suit or Suits, shall be filed, commenced or brought in any of His Majesty's Courts of Equity, in that part of Great Britain called England, by any person or persons having or claiming any Estate, Right or Interest in any Lands, Tenements or Hereditaments, under or by virtue of any Mortgage or Mortgages thereof, to compel the Defendant or Defendants in such Suit or Suits (having or claiming a Right to redeem the same), to pay the Plaintiff or Plaintiffs in such Suit or Suits the Principal Money and Interest due on any such Mortgage, or the principal Money and Interest

Mr. *Knight* appeared in support of the Motion.

The VICE-CHANCELLOR:—

If this Cause proceed regularly to a hearing, the Decree will give the Right of Redemption to the Bankrupt, as well as to the Assignees; and therefore without the Consent of the Bankrupt an immediate Decree cannot be made under the Statute.

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due on such Mortgage, together with any sum or sums of Money due on any Incumbrance or Specialty charged or chargeable on the Equity of Redemption thereof; and, in default of payment thereof, to foreclose such Defendant or Defendants of his, her or their Right or Equity of redeeming such mortgaged Lands, Tenements or Hereditaments; such Court or Courts of Equity where such Suit or Suits shall be depending, upon application made to such Court by the Defendant or Defendants in such Suit, having a right to redeem such mortgaged Lands, Tenements or Hereditaments, and upon his or their admitting the Right and Title of the Plaintiff or Plaintiffs in such Suit, may and shall, at any time or times before such Suit or Cause shall be brought to hearing, make such Order or Decree therein as such Court or Courts might or could have made therein, in case such Suit or Cause had then been regularly brought to hearing before such Court or Courts; and all Parties to such Suit or Suits shall be bound by such Order or Decree so made, to all intents and purposes, as if such Order or Decree had been made by such Court at or subsequent to the hearing of such Cause or Suit; any usage to the contrary thereof in anywise notwithstanding."

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26th Jan.

WEBSTER v. THRELFALL.

Answer.
Sufficiency.
Impertinence.

The Bill alleged that a Bill of Exchange held by the Defendant was an Accommodation Bill, and required him to set forth the Particulars of the Consideration pretended to be given for it: the Answer denied the Allegation, and stated that the Bill of Exchange was paid to the Defendant in the regular course of his business as a Banker, and that the Consideration did not consist of any specific Sum, but of Cash from time to time drawn out by the Payer: Held that this was a sufficient Answer, and that it would have been impertinent in the Defendant to set forth the general Banking Account.

THE object of this Bill was to have certain Bills of Exchange, which had been accepted by the Plaintiff, delivered up to him to be cancelled. It stated that, in 1821 one *Dentith*, who had since become a Bankrupt, and the Defendants *Threlfall*, a Banker, *Bird*, a Bill-broker, and *Johnson*, a Merchant, had had dealings together in the way of raising Money for their own accommodation; that *Dentith* requested the Plaintiff to accept two Bills of Exchange, which he said had been drawn for the accommodation of himself, *Threlfall* and *Bird*, and assured the Plaintiff that either he or they would pay them when due; that the Plaintiff complied with this request, and that *Dentith* afterwards indorsed and delivered the Bills to *Threlfall* and *Bird*, without Consideration; and it required *Threlfall*, if he should pretend that he had given a Consideration for the Bills, to set forth the nature and amount of it, of what it consisted, how much was given for each Bill, when, by whom, to whom, where and in whose presence it was paid, and whether in Notes, or Bills, or Cash, and how much in Notes, and how much in Cash, and the Dates of such Bills or Notes, and upon and by whom drawn, and by whom payable; and it contained the usual Allegation that the Plaintiff had Books and other Documents in his possession relating to the matters in the Bill.

Threlfall, in his Answer, denied that he had had any transactions with *Dentith*, except Banking Transactions and some Discount Transactions; and said, that in

September 1820, *Dentith* opened a regular Banking Account with him, since which time he had not discounted any Bills for *Dentith*; he denied that he had had any Dealings either with *Dentith*, *Bird* or *Johnson* in the way of raising Money for their accommodation; and he also denied all the other circumstances under which the Bills were stated to have been accepted. He said that *Bird* paid the two Bills of Exchange into his Banking-house, together with others, in the regular course of the Defendant's Business as *Bird's* Banker; and that, as they were paid in, they were placed to *Bird's* credit in his Banking Account with the Defendant, which then was and still continued to be an open running Account; that he had given a valuable Consideration for the Bills; and that it consisted of Cash, Bills of Exchange and Notes to the full Amount thereof, drawn out of his Banking-house by *Bird*, promiscuously, from time to time, as *Bird's* occasions required, according to the regular course of dealing between Bankers and their Customers; but that no Cash, Bills or Notes were drawn out by or paid to *Bird* on Account, or as Consideration for the Bills, specifically. He said that he had in his possession a Ledger and other Books containing a List of the several Bills received by him in the course of his Business since March 1820, and that he was unable to set forth, except as before stated, and as appeared by the Accounts contained in his Ledger and Day-book, the Particulars of the Consideration given by him for the Bills; and that the Plaintiff's Solicitor had inspected and taken Copies of, and made Extracts from those Accounts, and that the Books were still open for his inspection.

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The Defendant took the following Exception to the Answer: "For that the said Defendant, *John Threlfall*, hath

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not, in manner aforesaid, set forth the nature and amount of the Consideration paid by him for the delivery to him of the several Bills of Exchange in the said Bill mentioned, and of what in particular the same and each and every part thereof consisted, and how much in particular for each of such Bills, and when, and by whom, and to whom by name, and where, and in whose presence the same and each and every part thereof were and was paid, and whether in Notes and Bills, or Cash, and how much in Notes, and how much in Cash, and the Dates of such Bills or Notes (if any), and upon and by whom drawn, and by whom payable."

The *Master* allowed this Exception. The Defendant then excepted to the *Master's* Report; and that Exception now came on to be heard.

Mr. *Bell*, and Mr. *Spence*, for the Defendant:—

The Defendant, being a Banker, could not answer this Interrogatory without setting forth the Accounts. The proper course to be pursued by a Defendant in such a case is, not to set forth his Accounts, *verbatim*, from beginning to end, but to refer to his Books. The distinction taken by the *Solicitor-General*, in arguing the Case of *Alsager v. Johnson(a)*, is correct. He says, "The true distinction is, that a Defendant is not to refer to Accounts made out for the purpose of the Cause; but he may refer to those things which were in existence previously to the Cause."

Mr. *Koe*, for the Plaintiff:—

It is immaterial whether the Defendant acted as *Dentith's* Banker, or stood in any other relation to him. The Rule must be the same in both cases; for the De-

(a) 4 Ves. 224.

Defendant might have been Banker to *Dentith* as to the particular transaction only. It is quite consistent with this Answer, that the Defendant had given no valuable Consideration for the Bills. He says that the Consideration consisted of Cash, Bills of Exchange and Notes to the full amount, drawn out of the Bank, but does not state that the Notes were paid, or that the Accounts will show the Dates of the Bills. He does not point out what parts of his Books relate to this transaction. It is not sufficient for a Defendant, who is required to set forth the Consideration given for a Bill of Exchange, to refer to voluminous Accounts.

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v.
THRELFALL.

The VICE-CHANCELLOR :—

The Bill supposes a Case in which a distinct Consideration might be paid, or be alleged to be paid, by the Defendant, for these Bills; and requires all the Particulars of such distinct Consideration to be set forth by the Defendant. When it appears that no distinct Consideration was paid for these Bills, but that they formed Items in a general Banking Account of great length, I think that the Defendant was not only not required, but that he would not have been justified in setting forth all the particulars of all the Payments which he made on the general Banking Account, and thus imposing upon the Plaintiff the Expense of taking Copies of an Account which he had not sought. If, upon the coming in of such an Answer, the Plaintiff should think it would be useful to him to call for Copies of the General Banking Account, he could readily amend his Bill accordingly. In this view of the Case, it was not necessary for the Defendant to have referred to his Banking Books; but, because he has unnecessarily referred to them, he is not therefore bound to set forth the contents in his Answer.

Exception allowed.

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26th Jan.

Agreement.

In order to constitute an Agreement by Letters, the Answer to the written Proposal must be a simple acceptance of the Terms proposed, without the introduction of any new or different Term.

HOLLAND v. EYRE.

THE Bill stated that the Plaintiff had agreed with Mr. *Burton*, who was Lessee under the Crown, to take a Lease from him of a House in the *Regent's Park*, being No. 5, in *Cornwall Terrace*, for a Term, of which ninety-seven years were unexpired in April last; and being afterwards desirous to sell the House for the remainder of the Term, and the Defendant being informed thereof, and of the Plaintiff being entitled to the Lease from *Burton*, wrote to the Plaintiff a Letter, in the words following: "April 21st 1821.—Sir, I propose to give you for the Lease of ninety-seven years, of No. 5, *Cornwall Terrace*, subject to the Ground Rent, which I understand you pay, of 50 Guineas, the sum of 2,750*l.*, you making all the Glass perfect. *Henry Eyre.*"

The Plaintiff, in answer, wrote to the Defendant the following Letter.—"21st April 1824.—Sir, I accept your offer of 2,750*l.* for No. 5, *Cornwall Terrace*, subject to the Ground Rent of 50 Guineas, and to grant a Lease of it on the same Terms and Clauses as the Lease I hold from Mr. *Burton*. *S. A. Holland.*—P. S. I will make good the cracked Glass."

The Bill prayed a specific performance of the Agreement alleged to be formed by the two Letters, and that the Defendant might be decreed to pay to the Plaintiff the 2,750*l.*, and to accept and execute a counterpart of a Lease of the House, according to the true intent and meaning of the Agreement.

The Defendant put in a general Demurrer to the Bill, which now came on to be argued.

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Mr. *Seymour*, in support of the Demurrer, said that the Defendant in his Letter proposed to take from the Plaintiff an Assignment of the Lease which the latter was entitled to under his Agreement with *Burton*; but that the Plaintiff in his Answer offered to grant to the Defendant an Under-lease, which was a very different thing, and not so beneficial to the Defendant; as it would impose on him the necessity of inquiring, before he paid his Rent to the Plaintiff, whether the Plaintiff had paid his Rent to *Burton*, and whether *Burton* had paid his Rent to the Crown; and he cited *Huddleston v. Briscoe* (a).

Mr. *Sugden*, in support of the Bill, contended that the Plaintiff's Letter contained a clear acceptance of the Defendant's offer, and expressed his willingness to give to the Defendant what the Defendant had proposed to take, namely, an Assignment of the Lease which the Plaintiff was entitled to from *Burton*.

The VICE-CHANCELLOR:—

In order to constitute an Agreement by Letters, the Answer to the written Proposal must be a simple acceptance of the Terms proposed, without the introduction of a new and different Term. The Defendant proposes to give the Sum mentioned in his Letter for the Lease of the House, by which is to be understood the Lease which the Plaintiff had or was entitled to claim from Mr. *Burton*. The Plaintiff, in his Answer, does not consent to assign the Lease from Mr. *Burton* on the Terms proposed; but offers, on those Terms, to grant

(a) 11 Ves. 583.

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v.
EYRE.

an Under-lease, on the same Terms and Clauses as the Lease he holds from Mr. *Burton*. But the grant of an Under-lease is not the same thing as the Assignment of an original Lease; and the Plaintiff's Letter is not therefore an Acceptance of the Defendant's Proposal, but introduces into the Treaty a new and different Term.

Demurrer allowed.

1825.

26th & 27th Jan.

Creditor's Suit.

HANDFORD v. STORIE.

Where a Plaintiff files a Bill on behalf of himself and all other persons of the same Class, he retains the absolute dominion of the Suit until the Decree, and may dismiss the Bill at his pleasure; but after a Decree he cannot deprive the other persons of the same Class of the

THE Marquis of *Headfort*, and Lord *Bective* his Son, had granted Debentures to several of their Creditors, and afterwards conveyed certain Estates to Trustees, upon Trust to pay those Debentures.

The Defendant *Storie* was a holder of one of the Debentures, and had filed a Bill, on behalf of himself and all the other holders of such Debentures, against Lord *Headfort*, Lord *Bective* and the Trustees, praying for an account and payment. In order to put an end to this Suit, Lord *Bective*, through Mr. *Ball* his Agent, agreed to purchase *Storie's* Debenture, upon terms very advantageous to the latter. Accordingly *Ball*, who was the Receiver of the Trust Estates, paid to *Storie* the Sum

benefit of the Decree, if they think fit to prosecute it.

A Creditor who had filed a Bill, on behalf of himself and all other Creditors, against Trustees to whom Estates had been conveyed for payment of the Debts, having, in consideration of payment of his Debt by an Agent of the Debtor, dismissed the Bill before any Decree, although he was paid out of the Trust Fund, a Bill filed by another Creditor, on behalf of himself and all other Creditors, against the Plaintiff in the first Suit and the Trustees, for recovery of the Sum paid to him, was dismissed with Costs, it appearing that the Trustees gave no authority for the payment out of the Trust Fund, and that he did not know that he had been paid out of that Fund.

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agreed upon out of the Rents in his hands, and the Bill was dismissed before any Decree was made upon it. *Ball* had no authority from the Trustees to pay this Sum out of the Rents, nor did *Storie* know that it had been so paid, but considered that it had been advanced by Lord *Bective*.

The present Bill was filed by another Debenture Creditor, on behalf of himself and all the other Debenture Creditors, against Mr. *Storie*, Mr. *Ball*, Lord *Handford*, Lord *Bective*, and the Trustees; and it prayed that Mr. *Storie* might repay to the Trustees the Monies which he had so received from *Ball*, in order that the same might be duly distributed under the Trust Deed; and that Lord *Bective* and Mr. *Ball*, as well as Mr. *Storie*, might be answerable to the Trustees for those Monies.

This Cause now came on to be heard.

Mr. *Hart*, and Mr. *Pemberton*, for the Plaintiff, argued that Mr. *Storie*, having used the Suit instituted for the general benefit of the Debenture Creditors in order to obtain a particular advantage to himself from the Trust Property, was not at liberty to retain that advantage; and that, if this was not to be considered as an advantage obtained from the Trust Property, yet he could not use the Suit instituted for the common benefit of the Debenture Creditors as an Instrument to obtain terms advantageous to himself.

Mr. *Horne*, and Mr. *Roupell*, for the Defendant *Storie*.

Mr. *Sugden* for the Defendant Lord *Bective*.

Mr. *Wilbraham* for the Defendant *Ball*.

Mr. *Norton* for the Trustees.

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v.
STORIE.

The VICE-CHANCELLOR :—

If Mr. *Storie* had entered into a Contract with the Trustees, to be paid out of the Trust Monies, to the prejudice of the other Creditors, this would have not only been a Breach of Trust on the part of the Trustees, but Mr. *Storie* could not have been permitted to retain the Monies which he had thus improperly acquired.

Mr. *Storie's* Contract was, however, a Personal Contract with Mr. *Ball*, as the Agent of Lord *Bective*, and not with the Trustees; and he was altogether ignorant of the fact, that Mr. *Ball* advanced the Monies from the Trust Funds. These advances being made by Mr. *Ball* without the authority or privity of the Trustees, amount only to a private Loan from Mr. *Ball* to Lord *Bective*, and can in no manner affect the Interests of Mr. *Storie*.

It is said that Mr. *Storie*, having instituted this Suit for the benefit of himself and all other the Debenture holders, was not at liberty, upon general principles, to dismiss his Bill from motives of advantage to himself. I know of no such general principle. A Plaintiff who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion and at his own expense, retains the absolute dominion of the Suit until the Decree, and may dismiss the Bill at his pleasure. After a Decree he cannot, by his conduct, deprive other persons of the same class of the benefit of the Decree, if they think fit to prosecute it. The reason of the distinction is, that before Decree no other person of the class is bound to rely upon the diligence of him who has first instituted his Suit, but may file a Bill of his own; and that, after a Decree, no second Suit is permitted.

Bill dismissed, with Costs.

WATKINS v. CHEEK.

RICHARD WALKER, by his Will, bequeathed to his two Daughters, *Jane* and *Sophia Walker*, 1,000*l.* a piece, the same to vest in them immediately upon his death, but to be paid on their attaining their ages of twenty-one years, and the Interest thereof, in the mean time, to be applied by his Executrix in their Maintenance and Education; and he charged his Real Estate with the payment of those Legacies: and, subject to the payment of his Debts and Funeral and Testamentary Expenses, which he desired might be paid by his Executrix immediately after his decease, he gave all his Real and Personal Estate to his Wife for ever, and appointed her sole Executrix of his Will.

The Testator died, leaving his Wife and the two Daughters named in his Will, who were Infants of tender age, him surviving.

The Widow proved the Will; and the Personal Estate being insufficient for the payment of the Testator's Debts, she supplied the deficiency out of the Rents and Profits of the Real Estate. The Widow afterwards married *J. Watkins*; and, by a Settlement made previous to their Marriage, the Real Estate of her first Husband was conveyed to such uses as the Widow should appoint by Deed or Will; and, for want of such appointment, to

Where Real Estate is devised, subject to Debts and Legacies, and the Devisee is also Executor, a Purchaser or Mortgagee from him of the Real Estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the Mortgage or Purchase Money was not to be applied for the Debts or Legacies.

1825.
25th Jan. &
2d Feb.

Legacy.
Purchaser.

Legacy charged upon Real Estate, to vest immediately on the Testator's death, but to be paid to the Legatee on attaining twenty-one, and the Interest to be applied in the mean time for Maintenance, the Legatee having died before attaining twenty-one; *Held*, that the express direction that the Legacy should vest on the death of the Testator, prevents its sinking for the benefit of the Devisee, and that the personal Representative of the Legatee was entitled to the Legacy.

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the separate use of the Widow for her Life, with Remainder to her two Daughters, *Jane* and *Sophia Walker*, in Fee.

There were Issue of this Marriage two Daughters, *Margaret Watkins*, who was born on the 19th of June 1802, and *Jane Watkins*, who was born on the 27th of July 1804.

The Daughters of the first Marriage both died Infants, intestate and unmarried; the elder having died on the 23d of October 1803, and the younger on the 21st of January 1819.

J. Watkins, the second Husband, died in the year 1810. In June 1814 the Widow intermarried with *Solomon Cheek*; and, by a Settlement made previous to that Marriage, the Real Estate of the Testator, *Richard Walker*, was again settled to such uses as the Widow should appoint by Deed or Will, and, for want of such appointment, to the separate use of the Widow for Life, with divers Remainders over.

In October 1816, *Solomon Cheek* and his Wife mortgaged this Estate to *Henry Burgess* for 4,000*l.* The Mortgage Deed recited that *Solomon Cheek*, having occasion for the Loan of 4,000*l.* he and his Wife had requested *Burgess* to advance the same to him, upon the Security of the Estate; and the 4,000*l.* was in the Deed stated to have been advanced to him, at the request of his Wife; and he alone signed the Receipt for the 4,000*l.* indorsed on the Deed. The Right of Redemption was reserved to Mr. and Mrs. *Cheek* and the Heirs, Executors and Administrators of the latter.

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By Indenture, bearing date on the 29th of September 1818, Mrs. *Cheek* appointed the Estate, subject to the Mortgage, to such uses as her Husband should, by Deed, appoint, with divers Remainders over in default of appointment, with the ultimate Remainder to her Husband in Fee. He afterwards borrowed from *Burgess* a further Sum of 2,000*l.*; and, by an Indenture bearing date the 23d of March 1819, directed and appointed the Estate, by virtue of the Deed of the 29th of September 1818, to be a Security, not only for the 4,000*l.* before advanced, but also for the 2,000*l.* then advanced to him.

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By an Indenture, bearing date the 2d of June 1820, *Cheek* directed and appointed that the Estate should remain and be upon Trust for such persons, and for such estates and purposes, as his Wife should, by Deed, appoint, with divers Remainders over in default of her appointment.

By other Indentures, bearing date the 26th and 27th of September 1820, Mr. and Mrs. *Cheek* joined in conveying the Estate to Trustees, upon Trust to sell, and to invest the Produce of the Sale upon real or Government Security, and to apply the same as Mrs. *Cheek* should appoint; with divers Limitations over in default of appointment.

On the 27th of July 1821 the Trustees for Sale entered into an Agreement with *Burgess* to sell the Estate to him for 7,350*l.* deducting thereout the Principal and Interest due to him in respect of his two Mortgages for 4,000*l.* and 2,000*l.*

In order to complete this Purchase, one *Bousfield*, at

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the request of *Burgess*, obtained Letters of Administration to *Jane* and *Sophia Walker*. But Notice was given to *Bousfield*, on the part of *Margaret* and *Jane Watkins*, the two Daughters of *Mrs. Cheek* by her second Husband, that they claimed, as next of Kin of *Jane* and *Sophia Walker*, an Interest in the two Sums of 1,000*l.* given to them by the Will of their Father, as Charges upon the Estate. *Bousfield* therefore declined to join in the Conveyance to *Burgess*; and his Purchase was not completed.

Mrs. Cheek had no Child by her third Husband.

The present Bill was filed by *Margaret* and *Jane Watkins*, claiming to be entitled, with their Mother, to the two Sums of 1,000*l.* given to *Jane* and *Sophia Walker*; and praying that their Shares of these two Sums might be raised, with Interest, by Sale or Mortgage of a sufficient part of the Estate, and be laid out or invested for their benefit. The Defendants were *Burgess*, Mr. and Mrs. *Cheek*, the Trustees for Sale under the Indentures of the 26th and 27th of September 1820, and *Bousfield*, as the Administrator of *Jane* and *Sophia Walker*.

It was admitted that, after satisfying the Principal and Interest due on the two Mortgages for 4,000*l.* and 2,000*l.* the Estate would not be sufficient to pay the Shares of the two sums of 1,000*l.* which were claimed by the two Plaintiffs.

Cheek and his Wife did not resist the Claim of the Plaintiffs.

Mr. *Sugden*, and Mr. *Treslove*, for the Defendant *Burgess* :—

I. The Legacies to *Jane* and *Sophia Walker* are made

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payable at twenty-one; and, as they died before attaining that age, their Legacies sink for the benefit of the Land. The general Rule as to Legacies charged upon Land is, that the Time of vesting is the Time of Payment, and that, if the Legatee dies before the Time of Payment, his Personal Representatives are not entitled. The mere circumstance of directing Maintenance does not vest a Legacy. It is true that there are words in the Will which say that the Legacies are to vest on the Death of the Testator, and effect must be given to those words. But, as these Legacies are given to Females, the Testator may have used those words with reference to the event of their marrying and dying under twenty-one, leaving Issue. Upon examining the Cases as to Legacies charged upon Land, this construction will not seem too much forced. The first Case in which it was held that the circumstance of the Legacy being charged on Land should prevent the Court from considering it as a vested Legacy, although, according to all Rules, it must have been considered vested if not charged upon Land, was *Poulet v. Poulet* (a). That was a Case of extreme hardship; yet the Court held that, being a Charge upon Land, it could not be considered vested where the Legatee died before the Time fixed in the Will for the Payment. *Earl of Rivers v. Earl of Derby* (b); *Wilson v. Spencer* (c); *Hodgson v. Rawson* (d); *Lowther v. Condon* (e); *Manning v. Herbert* (f).

II. The Real Estate, being charged with the Debts of the Testator *Richard Walker, Burgess*, as Mortgagee or Purchaser, is not bound to take notice of the Legacies.

(a) 1 Vern. 204. 321. (b) 2 Vern. 72. (c) 3 P. W. 172.
(d) 1 Ves. 44. (e) 2 Atk. 127. (f) Amb. 575.

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Mr. Agar, and Mr. Duckworth, for the Plaintiffs:—

There are here express words that the Legacies should vest on the Testator's death. The Court is bound by those expressions. The Cases cited have no application; as they are Cases where the Payment was postponed on account of the situation of the Fund. *Duke of Chandos v. Talbot* (g); *Jennings v. Looks* (h).

Mr. Sugden in Reply.

Here there is a direction that the Legacy shall be vested at one time, and paid at another. The time of payment is what the Court must look to, when the question is whether the Legacy is to be raised or not, *Cowper v. Scot* (i).

The VICE-CHANCELLOR:—

The first point made is, that the two Legatees, *Jane* and *Sophia Walker*, having died before their ages of twenty-one, when the Legacies are made payable, the Legacies, as against the Real Estate, must sink for the benefit of the Devisee. And this would certainly be the Case, unless the Testator, by his direction that the Legacies shall vest in his Daughters immediately upon his death, be considered to have expressed a different intention.

I have doubted much upon this question; but, upon the whole, I believe the safest construction is, that the Testator did, by the direction in question, mean to express that the Legacies should not sink for the benefit of the Devisee of the Land if the Daughters should die under twenty-one. As applied to the Personal Estate, this direction is wholly inoperative. Without this direction, the Legacies, from the form of the Gift,

(g) 4 P. W. 612. (h) 2 P. W. 276. (i) 3 P. W. 119.

would have been payable out of the Personal Estate if the Legatees had died under twenty-one. And, as applied to the Real Estate, the direction does not seem capable of any other meaning than that the Legacies shall not fail by the death of the Legatees before the time of payment.

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The next point made is, that this Real Estate, being primarily charged with the Debts of the Testator, the Mortgagee was not bound to look to the satisfaction of the Legacies. As a general principle, this Proposition cannot be questioned. So a Mortgagee or Purchaser, from the Executor, of a part of the Personal Property of the Testator, has a right to infer that the Executor is, in the Mortgage or Sale, acting fairly in the execution of his duty, and is not bound to inquire as to the Debts or Legacies. But if the nature of the transaction affords intrinsic evidence that the Executor, in the Mortgage or Sale, is not acting in the execution of his duty, but is committing a Breach of Trust, as where the consideration of the Mortgage or Sale is a personal Debt due from the Executor to the Mortgagee or Purchaser, there such Mortgagee or Purchaser, being a Party to the Breach of Trust, does not hold the Property discharged from the Trusts, but equally subject to the payment of Debts and Legacies as it would have been in the hands of the Executor.

The same principle is applicable to Real Estate; and the question is, whether the transactions in question did not afford intrinsic evidence that the Mortgages to the Defendant were not made by *Cheek* and Wife, in order to pay the Charges created on the Estate by the Will of the Testator *Walker*, but for other purposes which amounted to a Breach of Trust. In the Mortgage

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Deed for 4,000*l.* it is expressly stated that the Money is raised because *Solomon Cheek*, the Husband, had occasion for it; and he alone signs the Receipt for the Consideration. The Mortgagees had therefore notice, from the intrinsic evidence of the transaction, that this Sum was not to be applied in satisfaction of the Charges under the Testator's Will.

Before the lending of the second Sum of 2,000*l.* *Solomon Cheek* had, by the appointment of his Wife, acquired the legal Fee of the Estate, subject to the first Mortgage; and the second Sum of 2,000*l.* is a mere personal Loan to him, having no colour of connection with the Charges on the Testator's Estate. I am of opinion, therefore, that the Defendant, the Mortgagee, was a Party to the Breach of Trust committed by these Mortgages, and that the Plaintiffs are entitled to a Decree according to the Prayer of the Bill.

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7th February.

REYNOLDS v. JONES.

**Tenant for
Life and Re-
mainder-man.
Trustee and
Cestui que
Trust.**

Tenant for Life and Remainder-man. Trustee and Cestui que Trust.

A Trustee of a Term for payment of Debts purchased the Inheritance from the Tenant for Life, and had it conveyed to him by Fine and Feoffment. The circumstance of the Purchaser being Trustee does not entitle the Remainder-man to an Account of Rents, except from his Entry to avoid the Fine, nor, if he neglects to claim for five years, does it prevent his being barred.

remainder to all the Children of *Ann Watkins*, in such Shares and Proportions as she should by Deed appoint, and, for want of such appointment, to all such Children, in equal Shares, as Tenants in Common in Fee, with an Executory Devise over, in case there should be no such Child living at the death of *Ann Watkins*.

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v.
JONES.

Ann Watkins, upon her Mother's decease, entered into possession of the Estates, and afterwards married *Bryan Reynolds*, and had Issue by him five Children, all Sons, the eldest of whom, *W. Cook Reynolds*, was born in 1772; and the fourth, the Plaintiff, *Thomas Reynolds*, in 1778. The second Son attained his age of twenty-one years, and died, unmarried and intestate, in the lifetime of his Mother. The two other Sons also died in the lifetime of their Mother, Infants and unmarried. The Mother died in the year 1801: *W. Cook Reynolds* was at that time resident in Jamaica, and continued there until the year 1815, when he died Intestate and without Issue. In or about Easter Term 1783, Mr. and Mrs. *Reynolds* levied a Fine *sur convenance de droit come ceo*, &c., with Proclamations, of the Estate so devised by the Will of *Amy Cook*; and, by Indenture of Assignment, bearing date the 5th of April 1784, and made between *Jones* of the first part, Mr. and Mrs. *Reynolds* of the second part, and *Edmund Chapp* of the third part, reciting that the Debts due from the Testatrix, *Amy Cook*, her late Husband and her late Son amounted to the full sum of 1,970*l.* at the time of her decease, and consisted of the particulars therein mentioned, and, amongst the rest, of the sum of 100*l.* due on Bond to *John Jones*; and also reciting that Mr. and Mrs. *Reynolds*, in pursuance of the Will of *Amy Cook*, had lately sold other parts of her devised

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v.
JONES.

Estates for the sum of 380*l.* and had applied the same in discharge of the Debts due from the Testatrix, her Husband, and her Son; and further reciting that *Bryan Reynolds*, and *Ann* his Wife had agreed to sell other parts of the devised Estate, called *For Leaze*, and twenty Acres of Arable Land, to *John Jones*, for a sum of 217*l.* 18*s.* to be applied towards payment of the Debts of the Testatrix, her Husband, and Son, and that it had been agreed that the Term of five hundred years, as to the Premises agreed to be sold, should be assigned by *Jones* to *E. Chapp*, in Trust for *Jones* and his Heirs; it was witnessed that, for the Considerations aforesaid, and in consideration of the 217*l.* 18*s.* paid by *Jones* to *Reynolds* and his Wife, the Term of five hundred years, as to the Lands called *For Leaze*, and twenty Acres; was assigned to *Chapp* for the remainder of the Term, in Trust for *Jones*, his Heirs and Assigns, and to attend the Inheritance. And, by Indenture of Feoffment, bearing date the 6th of April 1784, made between Mr. and Mrs. *Reynolds* of the one part, and *John Jones* of the other part, the Land called *For Leaze*, and the twenty Acres, were conveyed to *John Jones* and his Heirs; and it was declared, that the Fine should enure to the use of *Jones*, his Heirs and Assigns.

Upon the execution of these Indentures, *Jones* entered into the possession of the Premises therein comprised, and continued in the possession thereof until his death; in 1801. He was succeeded in the Possession by the Defendant *Thomas Jones*, his Son, Heir at Law, and Executor. On the 10th of July 1817, the Plaintiff, *Thomas Reynolds*, made a formal Entry upon the Premises; and, on the 20th of September following, filed the present Bill, claiming to be entitled, in his own Right, to one fifth of the Premises, and, as Heir at Law to

his eldest Brother, *W. Cook Reynolds*, to the other four fifths; and praying to have an Account taken of the Rents of the Premises from the death of his Mother, and to have the Possession delivered and assigned to him.

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Mr. Sugden, and *Mr. Wilbraham*, for the Plaintiff, contended that *John Jones*, being a Trustee of the Term, the whole transaction was, on his part, a Breach of Trust; that the Plaintiff was, for that reason, entitled to carry back the Account of Rents to the death of his Mother; and that, for the same reason, he was, as to the one fifth which he claimed in his own Right, not barred by the Fine, notwithstanding his Entry to avoid it was not made within five years after his Mother's death.

Mr. Lovat, for the Defendant, insisted, that the Plaintiff could not, at Law, recover the Mesne Profits, except from the time of his Entry; and cited *Doe v. Hicks* (a), *Compere v. Hicks* (b), and *Hughes v. Thomas* (c). He said that Equity must in this respect follow the Law, and that a Court of Equity would no more give the Plaintiff the mesne Profits from the death of the Tenant for Life, than a Court of Law could; that this point was adverted to by Lord *Hardwicke*, C. in *Norton v. Frecker* (d); that the Plaintiff must try his right at Law, before he could come into Equity for the Rents and Profits; that the Term was no impediment to his bringing an Ejectment, because he might have got it set aside by filing a Bill for that purpose; that the Plaintiff was not entitled to relief on the ground of *Jones* being a Trustee; for, though he was

(a) 7 T. R. 433.

(b) Ibid. 727.

(c) 13 East, 474.

(d) 1 Atk. 524.

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Trustee of the Term, he was not Trustee of the Inheritance; that, if the Purchase-money had been applied in payment of the Debts, the Defendant ought to have the benefit of the Term; and, upon the whole, he submitted that the Court could not order the Estate to be delivered up, and that the Plaintiff was not entitled to recover the Rents at all; but if he was, that, upon the authority of what was said by Lord *Hardwicke*, in *Norton v. Frecker*, he could recover them only from the time of Ejectment brought, or Bill filed, or at the utmost from the time of Entry.

Mr. *Sugden*, in reply, admitted that in a common Case the Account must be the same in Equity as it was at Law; but he said that it frequently happened that, where a Bill was filed to prevent the setting up of outstanding Terms, the year elapsed before the Plaintiff could try his Title; that in such a case the filing of the Bill was equivalent to bringing the Action, and the Suit stopped the time from running; that therefore relations must be had to the filing of the Bill; that, in this Case, the possession of *Jones*, during the Life of the Tenant for Life, went for nothing, for the Plaintiff was not bound to take advantage of the Forfeiture; that the Right of the eldest Son was saved until he died, which was in 1815; that *Jones*, the Purchaser, was a Trustee of the Fee; for, after the Debts were paid, he was a Trustee for the Claimants of the Inheritance, and that therefore it was impossible for him to bar the Plaintiff's Right; that the Case of *Norton v. Frecker* was decided upon a legal Title; but that in the present Case there was no remedy for the Plaintiff at Law, because the legal Interest was in the Defendant; and that the Defendant had no Claim in respect of the Purchase Money having been applied in payment of the Debts,

for there was no Evidence of its having been so applied but, on the contrary, the Assignment and Feoffment mentioned that it was paid to Mr. and Mrs. *Jones*, who were not the Trustees for payment of the Debts.

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The VICE-CHANCELLOR:—

The elder Brother, *W. Cook Reynolds*, being abroad at the death of his Mother in 1801, and continuing abroad till his death in 1815, the Entry of the Plaintiff, his Brother, upon the Premises in 1817, was sufficient to protect from the operation of the Fine the four fifths of the Estate to which the elder Brother was entitled at the death of his Mother, and to which the Plaintiff succeeded as his Heir at Law. Upon this Entry, if there had been no outstanding Term, the Plaintiff could only have proceeded at Law; but, in respect of the outstanding Term, he was entitled to be relieved in Equity. Unless the circumstance that *John Jones*, the Father of the Defendant, was himself the original Trustee of this Term, make a difference in the Case, it is plain that his relief in Equity must be the same as it would have been at Law; and that, as at Law he could have recovered the mesne Profits only from the time of his Entry, so in Equity his Account of Rents and Profits must be limited to the same period. I am of opinion that the circumstance that *John Jones*, the Purchaser, was himself the original Trustee of the Term, does in this respect make no difference. *John Jones* was no Party to the Disseisin created by the Fine; and his Trust Term was not, nor could be made ancillary to that Disseisin; and his acceptance of the tortious Fee operated no prejudice to his *Cestui que Trusts*. To them it was perfectly indifferent whether the tortious Fee passed to *John Jones*, or to a Stranger, or remained in the Father or Mother. The Plaintiff, therefore, as to

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the four fifth parts of which his elder Brother was seised at the death of his Mother, is entitled to an account of the Rents and Profits from July 1817, when the Entry was made, and to a delivery of the Possession, and an assignment of the Term, as to such four fifth parts; subject, however, to a consideration of the Equity which is claimed in the Answer.

In the Assignment of the Trust Term, made by *John Jones* the Trustee, upon his purchase of the wrongful Fee, to which Assignment the Father and Mother of the Plaintiff are Parties, it is recited that the Sale was made in the substantial execution of the Trusts of the Will of the Testatrix, and for the purpose of paying the Debts charged upon the Estate, and the Defendant therefore claims to stand in the place of the Creditors, to the extent of the Purchase Money actually applied in payment of the Debts. If, as the Answer suggests, the whole of the Estate was not equal to the payment of the Debts, and this contrivance for the Sale of the Fee was only resorted to for the purpose of raising a larger Sum in satisfaction of the Debts than could be raised by sale of the Term, there can be no complaint of the motives of the Parties, however irregular their conduct may have been. I am of opinion, therefore, that the Defendant is entitled to an inquiry whether the Purchase Money of 218*l.* 17*s.*, or any and what part thereof, was applied in payment of Debts of the Testatrix, her Husband, and her Son, which would have been properly raised by Sale or Mortgage of the Term of five hundred years: and, in case the *Master* shall find that the said Sum, or any part thereof, was so applied, then that the Defendant is entitled, as against the Plaintiff suing for the four fifths parts as Heir to his Brother, to be repaid four fifths of the Sum so applied, together with Interest thereon from

the time of the entry in July 1817, when the Plaintiff's Title to the four-fifth parts of the Rents and Profits will begin.

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The Claim of the Plaintiff as to one fifth part of the Property, in his own right, under the Limitations of the Testatrix's Will, suggests greater difficulties. The Title of the Plaintiff, as to the one fifth part of the Fee of the Estate, is wholly gone by the Fine and Nonclaim; and, speaking now without reference to the circumstance that *John Jones* the Purchaser was the Trustee of the Term, I am of opinion that, where there is a Term to attend the Inheritance, and the right to the Inheritance is lost by Fine and Nonclaim, Equity must follow the Law, and cannot consider him who has lost the Inheritance as entitled, in Equity, to claim the Term which is to attend it; and, for the same reasons which I have already given, I think, in this respect, it makes no difference that *John Jones* was himself the Trustee of the Term. As to the one fifth, therefore, which the Plaintiff claims in his own right, my opinion is, that he altogether fails.

Reserve the consideration of further directions and Costs until after the *Master* shall have made his Report.

1825.
8th, 10th, and
22d Feb.

THACKERAY v. HAMPSON.

Legacy.

Residuary Bequest to two Grand-daughters of Testatrix, "in Trust till they come of age or marry, the Interest to be received in the meantime, and paid to them; but if one of them die before Marriage or of Age, then to the Survivor or her Child or Children; but should they both die leaving no Issue, then I give them power to leave it by Will as they shall think fit." One of the Legatees married, and the other attained twenty-one. *Held*, that they both acquired absolute vested Interests.

ELIZABETH TATTERSALL made a Will and two Codicils: the second Codicil was in her own handwriting, and contained the following Bequest:—

"I leave the Residue and whatever else I may hereafter be entitled to, whatsoever and wheresoever, to my two dearest Grand-daughters, *Mary Ann Cottin* and *Elizabeth Margaretta Cottin*, equally divided, including what I have already left them in my Will and other Codicil, in Trust till they come of age or marry, which shall first happen, the Interest to be received in the meantime and paid them; but if one of them die before marriage or of age, then to go to the Survivor, or her Child or Children; but should they both die leaving no Issue, I then give them the power to leave it, by Will, as they shall think proper, being well assured they will do what is right."

Mary Ann Cottin married the Plaintiff, Dr. *Thackeray*, and afterwards died, leaving an infant Child, who was one of the Defendants. *Elizabeth Margaretta Cottin*, the other Plaintiff, long since attained the age of twenty-one.

The question was, what interest the Grand-daughters had in the Residue.

Mr. *Heald*, and Mr. *Lynch*, for the Plaintiffs:—
The Grand-daughters take absolute Interests, liable

to be divested in case of their dying under twenty-one or before marriage. Both of them having lived till one of them was married and the other attained twenty-one, their Interests became absolute and indefeasible. The period of payment is twenty-one or marriage; and the words "in Trust till they come of age or marry," suspend the time of payment only, and not that of vesting. The direction to pay them Interest in the meantime, is sufficient to give them vested Interests. In *Hanson v. Graham* (a), it was held that a direction to pay Interest in the meantime to the Legatee, was sufficient to vest the Legacy, even where the words of Gift of the Principal imported a Contingency. In the passage, "but if one of them die before marriage or of age," the word *or* must be read *and*; because, if taken in the disjunctive and one of the Grandchildren died under twenty-one leaving Issue, the Issue could not take. In *Eastman v. Baker* (b), Lord Chief-Justice *Mansfield*, speaking of that Case in which *or* was read *and*, says, "according to *Fairfield v. Morgan* (c), and the other Cases cited, it must mean *and*, because, if it does not, it follows that, upon the Contingency of the Daughter dying having Issue, but not having attained the age of twenty-one years, the Estate would pass over from her Children; which could never be the Testator's intention." The words, "should they both die leaving no Issue," must be confined to their dying under twenty-one without Issue. If so, the Case is within *Right v. Day* (d); for, if the expressions were not confined to dying under twenty-one without Issue, the whole Fund must have remained under the control of the Trustees: but instead of that, the Testatrix says

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THACKERAY
v.
HAMPTON.

(a) 6 Ves. 239.

(b) 1 Taunt. 182.

(c) 2 New Rep. 38.

(d) 16 East, 67.

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that, in such an event, the Grand-daughters are to have an absolute power to dispose of it as they please; and states also a time at which they are to have it paid. *Doo v. Brabant* (e) is a much stronger Case than this, because the Will there contained no direct Gift to the Children. The power to dispose by Will is alone enough to give the Grandchildren absolute Interests. *Robinson v. Dugale* (f).

Mr. Thomson for the Infant Defendant *Thackeray* :—

In *Newman v. Nightingale* (g), where the Words of Bequest were “to the sole Use of Mrs. Elizabeth, or of her Children for ever,” it was held, that Mrs. *Newman* took only a Life Estate, and that her Children took an absolute Interest in Remainder. The Words used in this Case would not give the Grandchildren an Interest amounting to an Estate Tail if the Property were Real Estate. The dying without Issue is not, upon the Words used, confined to any particular age, but is general, extending to Death without Issue at whatever age.

Mr. Turner, and Mr. Bassett, for the other Defendants, who were Trustees.

The VICE-CHANCELLOR :—

22d Feb.

It is impossible to reconcile the different expressions in this Codicil, if they are to be literally understood. The Testatrix first gives to the Grand-daughters an absolute Interest on their attaining twenty-one or marrying sooner; and, if either die before twenty-one and unmarried, then her plain intention is, that her

(e) 4 T. R. 706. (f) 2 Vern. 181. (g) 1 Cox, 341.

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Share shall go to the other Grand-daughter, if she be living; or, if she be dead, to any Child or Children she may have left.

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HAMFSON.

It is not safe to defeat this plain expressed intention of the Testatrix by a subsequent ambiguous passage. Both Grand-daughters having lived either to marry or to attain twenty-one, both took absolute vested Interests: and the Testatrix must be intended, by the expression, "should they both die leaving no Issue," to have meant a dying without Issue before the Shares became absolutely vested.

ROTHWELL v. ROTHWELL.

21st Feb.

THE Defendant *Rothwell* covenanted, by his Marriage Settlement, to pay, within twelve months after the Marriage, 850*l.* to the Trustees of the Settlement, upon certain Trusts for the benefit of himself and his intended Wife and the Issue of the Marriage. This Sum not being paid at the appointed time, the Children of the Marriage filed a Bill against their Father and Mother and the Trustees, to have the Trusts of the Settlement performed, and the 850*l.* got in and invested upon the Trusts of the Settlement. *Rothwell*, in his Answer, admitted the Settlement, and also that the 850*l.* had not been got in, but that it was still in his hands.

Practice.
Payment of
Money into
Court.

A Defendant, who had covenanted to pay a sum of Money to the Trustees of his Marriage Settlement, but had omitted to do so, ordered, upon Motion in a Suit for the performance of

the Trusts of the Settlement, to pay the Money into Court.

Where the Answer contains a clear admission, that there is Trust Money in the hands of a Defendant, the Court will always, on an interlocutory application, order it to be paid into Court.

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Mr. *Spence*, for the Plaintiffs, now moved, that *Rothwell* might be ordered to pay the 850 *l.* into Court.

Mr. *Pemberton* opposed the Motion, on the ground that the Relief sought could be obtained by Decree only.

The VICE-CHANCELLOR:—

An Executor admitting himself to be a Debtor to the Testator at his Death, will be ordered to pay the Debt into Court.

Where the Answer contains a clear admission that there is Trust Money in the hands of a Defendant, the Court will make an interlocutory Order for securing it in the name of the Accountant-General; and the Father's Answer contains a clear admission that this sum of 850 *l.* Trust Money is in his hands. So where an Executor admits himself to have been a Debtor to the Testator at the time of his Death, this has always been held a clear admission of Assets in his hands to the amount of the Debt, and he is compelled to pay it into Court accordingly.

HADDOCK v. THOMLINSON.

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SOME of the Parties interested in the subject of this Suit were charged by the Bill to be out of the Jurisdiction of the Court, but were not named in the Prayer of Process, and an Objection was taken to the Bill on that account.

Pleading.

It is not necessary to pray Process against Persons who are charged to be out of the Jurisdiction of the Court.

Mr. *Hart*, in support of the Objection.

Mr. *Martin*, *contra*.

The VICE-CHANCELLOR :—

It is usual and convenient that such Parties should be named in the Prayer of Process; because, if they come within the Jurisdiction, Process may issue against them without amending the Bill. But the omission of their Names in the Prayer of Process does not render the Record defective (*a*).

(*a*) Mitf. 134.

JONES v. TOTTY.

21st Feb.

A COMMISSION of Partition was returned with a Paper Schedule of the quantities and particulars of the Lands attached to it, signed by the Commissioners and referred to in their Return.

Practice.
Writ of Partition.

Where a Schedule, written on Paper,

was returned with a Commission of Partition, the Plaintiff's Clerk in Court was allowed to engross it on Parchment, and to file the Engrossment with the Return, in analogy to the Practice where Foreign Depositions are returned on Paper.

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JONES
v.
TOTT.

Mr. *Smith*, for the Plaintiffs, moved that their Clerk in Court might now engross the Schedule upon Parchment, and that the Engrossment might be filed with the Writ and Return.

Mr. *Daniell*, for the Defendants, opposed the Motion.

The VICE-CHANCELLOR:—

It is not unusual for Depositions taken abroad to be returned upon Paper from places where Parchment is not to be had; and then the Practice is, to apply to the *Master of the Rolls*, by Petition, that the Clerk in Court may engross upon Parchment the Depositions so taken, and that the original Depositions and Engrossments may be filed together. This Case is not altogether within that Principle; because here Parchment might have been had, and the use of Paper is a mere inadvertence on the part of the Commissioners. In order, however, to avoid the Expense and Inconvenience of sending the Proceedings back to the Commissioners to correct their Error, I will act upon analogy to the Case which I have stated, and make the Order as prayed (a).

(a) See *Chitty v. East India Company*, 2 Cox, 190.

21st Feb.

Practice.
Pro confesso.

If there is only one Defendant, the Bill may be ordered to be taken, *pro confesso*, on Motion.

LEWIS v. MARSH.

THE Defendant being brought up in custody, Mr. *Cooper*, for the Plaintiff, now moved that the Bill might be taken *pro confesso*, there being no other Defendant; and he cited *Seagrave v. Edwards* (a).

Motion granted.

(a) 3 Vés. 372.

HOUGHAM v. SANDYS.

1845.
26th Feb.

THE object of the Suit was to obtain the Opinion of the Court as to the Rights of the Defendants to certain Sums of which the Plaintiffs were Trustees. The Decree directed certain Inquiries to be made, and the Parties to be examined on Interrogatories, as the *Master* should direct. The *Master* certified that, for the better prosecuting the Inquiries, it would be necessary to examine one of the Plaintiffs as a *Witness* in the Cause.

Practice.
Witness.

Mr. *Spence*, for the Defendants, now moved that that Plaintiff might be examined as a *Witness*, in pursuance of the Certificate, and that the Defendants might sue out a Commission for that purpose. He said that the Plaintiffs were merely Trustees, and had no beneficial Interest in the Property in dispute.

Permission given to Defendants, after Decree, to examine a Plaintiff as a *Witness*, the *Master* having certified the necessity for so doing, and the Plaintiff having no beneficial Interest in the Property in dispute.

Motion granted.

HODGSON v. DEAN.

21st Feb. and
7th March.

NATHANIEL HODGSON, by his Marriage Settlement, dated in August 1755, conveyed an Estate in the North Riding of Yorkshire, to the use of himself for Life; with Remainder to his intended Wife for Life; with

Practice.
Affidavit.
Notice.

Plaintiff who claims an Estate as Tenant in Tail under the Marriage Settlement of his Father and Mother, to prove their Marriage by Affidavit, before he shows Cause against dissolving an Injunction to restrain an Ejectment brought against him to recover the Estate.

Where it appears that an Incumbrancer on an Estate in Yorkshire searched the Register from a certain date only, it will not be presumed that he had Notice of any of the Contents prior to that date.

It is not necessary for a

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Remainder to the first and other Sons of the Marriage in Tail Male; with divers Remainders over. At the date of the Settlement the Legal Estate in Fee was outstanding in a Mortgagee; but in 1759 *Nathaniel Hodgson* took a Re-conveyance from the Mortgagee to himself in Fee. In 1794 *Nathaniel Hodgson* died, leaving *Nathaniel Bryan Hodgson* his eldest Son, who, upon the death of his Father, entered upon the Estate, as Tenant in Tail under the Settlement. In November 1815, *Nathaniel Bryan Hodgson*, representing himself to be seised in Fee of the Estate, mortgaged it to the Defendant *Dean* for a Term of one thousand years; and, in the Abstract of Title delivered to the Defendant upon that occasion, he suppressed his Father's Settlement, but stated the Mortgage in 1728, the Re-conveyance to his Father after the Settlement, and represented himself as taking by descent from his Father. The first Mortgage was not registered, because the Register Act for the North Riding of Yorkshire was not passed till after it was executed; but the Settlement and the Defendant's Mortgage Deed were duly registered. On the Treaty for the Mortgage, the Defendant's Solicitor wrote to the Deputy Registrar of the Riding, requesting that he would search the Register as to the Estate in question up to the year 1794, when *Nathaniel Hodgson* died; and was informed, in Answer, that the search had been made up to the year 1794, but that nothing had been found relating to the Estate, except a Deed executed by *Nathaniel Bryan Hodgson* in 1801, which had no bearing upon the present question.

Upon the death of *Nathaniel Bryan Hodgson*, without having suffered a Recovery of the Estate, the present Plaintiff, his eldest Son, entered upon it as Issue in

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v.
DEAN.

Tail; and the Defendant having brought an Ejectment to recover Possession under his Mortgage Deed, the present Bill was filed to restrain that Action, on the ground that the Defendant had Notice of the Settlement, in consequence of the search made in the Register. The Defendant, in his Answer, insisted upon his Title as Mortgagee of the legal Estate without Notice of the Settlement; and stated that he did not know nor could set forth whether any such Settlement was made by *Nathaniel Hodgson*, nor whether the Plaintiff was or not entitled to any Estate under that Settlement. The Injunction having been obtained, a Motion was made to dissolve it. The Plaintiff, preparatory to showing Cause against that Motion, filed an Affidavit to prove the execution of the Settlement, and that no act had been done to bar the Estate Tail created by it; but he omitted to prove the Marriage of his Father and Mother.

Mr. *Hart*, and Mr. *Barber*, on showing Cause against dissolving the Information, said that where the Answer of the Defendant did not admit the Plaintiff's Right, it was necessary that the Plaintiffs should support it by Affidavit, and that he had attempted to do so here, but had failed.

The *Vice-Chancellor* said that, where an Instrument was neither admitted nor denied in the Answer, it was necessary for the Plaintiff to prove the existence of it by Affidavit; but that he thought the Rule and Practice were otherwise as to the Personal Title of the Plaintiff; and that he supposed that the reason for the distinction was, that the Plaintiff being, from the nature of the Proceedings, necessarily in the actual Possession

1895.

HEDDERSON
v.
DEAN.

of the Land in question, either by himself or his Tenant, such Possession was considered as sufficient Evidence of his alleged Title for the purpose of the Injunction where, though not admitted, it was not denied by the Answer; and he stated that, where the Answer denied the Title of the Plaintiff, there no Affidavit could be filed by the Plaintiff in opposition to the Answer, and he referred to the Case of *Norway v. Rowe* (a).

But he added that this point was not material; because, if the Affidavit filed by the Plaintiff had, as the Defendant's Counsel alleged, omitted to state the fact of the Marriage of the Plaintiff's Father and Mother, he would permit the Plaintiff to cure the omission by a further Affidavit.

Mr. Hart, and Mr. Barber, then contended that, although it was not necessary for the Defendant to search the Register when he took the Mortgage, yet, having actually caused a search to be made, he must be considered as having constructive Notice of all the contents of the Register, and consequently of the Settlement in 1755, which was duly registered: and they referred to Lord Redesdale's Opinion in *Bushell v. Bushell* (b).

Mr. Sugden, and Mr. Rose, appeared for the Defendant.

The VICE-CHANCELLOR:—

The Defendant, not being bound to search the Register, cannot be affected by constructive Notice of the registered Settlement. It must be established against him, that he had actual Notice of that Settlement. It

(a) 19 Ves. 144.

(b) 1 Scho. & Lef. 103.

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is plain, in this Case, that he had not actual Notice, since the Search made on his part did not reach higher than 1794, and the Settlement was made in 1755.

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Where a Search is generally admitted or proved, there it may be a proper rule of evidence or presumption that the Party searching was acquainted with all the contents of the Register; but the particular facts in this Case exclude that presumption.

HAMILTON v. HIBBERT.

26th Feb.

AN Attachment had issued against the Defendant for want of an Answer, and the Sheriff had returned *Cepi Corpus*. The Defendant then filed a Plea to the whole Bill.

Practice.

A Plea may
be filed after
the return of a
simple Attach-
ment.

Mr. *J. Wilson*, for the Plaintiff, moved that the Plea might be taken off the File for irregularity, on the ground that the Defendant, being in contempt, could only answer the Bill.

Mr. *Spence* appeared for the Defendant.

The *Vice-Chancellor* refused the Motion, with Costs; saying that a Defendant might plead after the return of a simple Attachment, but not of an Attachment with Proclamations, and referred to *Sanders v. Murney* (a).

(a) Ante, vol. 1, 225.

1825.
26th Feb.
& 5th March.

WYNNE v. JACKSON.

Practice.
Injunction.

A Defendant may file a further Answer before the *Master* has signed his Report as to the insufficiency of the first Answer.

An Order for an Injunction for want of an Answer obtained after the *Master* has signed his Report of the insufficiency of the Answer, but before the Report is filed, is irregular.

THE Plaintiff had taken Exceptions to the Answer, and some of them were allowed by the *Master*; but, before the Report was made, the Defendant put in a further Answer. The *Master* then signed his Report, and it was filed on the day after. On the day on which the Report was signed, the Plaintiff obtained an Order for an Injunction for want of an Answer.

Mr. *Spence*, for the Defendant, now moved to discharge that Order, for irregularity, contending that the Plaintiff could not proceed upon the *Master's* Report, until it was filed; as such a proceeding would be in direct violation of the Order of the 29th of October 1792 (a); and he cited *Knox v. Symmonds* (b), and *Job v. Barker* (c).

Mr. *Sugden*, *contra*.

Mr. *Walker*, the Registrar, having, by the *Vice-Chancellor's* desire, inquired into the Practice upon the subject, informed His *Honor* that the Defendant was regular in filing his further Answer; and that the Plaintiff was irregular in obtaining the Order for the Injunction, not only because the Report was not filed when he obtained the Injunction, but because the further Answer was then filed.

Motion granted.

(a) Beam. Ord. 292.

(b) 1 Ves. jun. 87.

(c) 2 Swan. 255.

MALTBY v. RUSSELL.

1825.
9th & 21st Mar.

THIS was a Creditors' Suit. The Decree directed the *Master* to take the usual Accounts.

Executor.

The Personal Representatives had, subsequently to the filing of the Bill, paid several of the Testator's Debts, one of which was due to a Firm in which one of them was a Partner. The *Master* having refused to allow them the Sums they had paid in discharge of those Debts, they took Exceptions to his Report.

An Executor or Administrator may, after a Suit is instituted against him for an Account, pay any simple contract or specialty Creditor, and will be allowed such payment in passing his Accounts.

These Exceptions now came on to be argued.

Mr. Sugden, Mr. Simpkinson. and Mr. Girdlestone, jun. in support of the Exceptions, insisted on the authority of *Lord Orford v. Darston (a)*, in which the House of Lords reversed the Decree of Lord Keeper Wright (b), as having settled that such Payments ought to be allowed to the Executor; and they also cited *Perry v. Phelps (c)*, *Robinson v. Tonge (d)*, and *Waring v. Danvers (e)*.

Mr. Rose, and Mr. Pemberton, for the Devises of the Real Estate.

Mr. Horne, and Mr. Lovatt, for the Plaintiffs, contended that, after a Bill for an Account was filed against the Personal Representatives, they had no right to prefer

(a) Colles, P. C. 229.

(b) Pre. Cha. 188.

(c) 10 Ves. 34.

(d) 3 P. W. 398.

(e) 1 P. W. 295.

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any Creditor: and cited *Bright v. Woodward* (f), and *Dee* (g).

The *Vice-Chancellor* on the Argument, expressed a strong opinion in favour of the *Master's* Report, and doubted the correctness of *Colles's* Report of the Case of *Lord Orford v. Darston*. His Honor, however, took time to consider of the Case, and afterwards delivered Judgment to the following effect.

The VICE-CHANCELLOR:—

That an Executor should be permitted, after a Bill filed for the administration of the Assets here, to prefer one Creditor to another, breaks in upon the ruling principle, that Equality is Equity. Even at Law, an Executor cannot, after an Action brought, prefer one Creditor to another, unless Judgment is first obtained against him; which is founded upon the principle of greater legal diligence. He is indeed permitted to confess such Judgment, (which breaks in upon the principle of greater legal diligence), because it is said that he is not bound to charge his Testator's Estate with Costs, by defending the Action where he knows the Debt to be due.

I find, however, that the Case of *Darston v. Lord Orford*, in the House of Lords, is correctly reported; and in *Waring v. Danvers*, (h) it is expressly referred to as establishing the point that a Creditor may give a preference after a Suit instituted.

I am bound therefore by this authority to allow the Exceptions in this Case.

(f) 1 Vern. 369.

(g) 2 Cha. Ca. 200.

(h) 1 P. W. 295.

STRUTT v. FINCH.

WILLIAM WALTHAM devised as follows :

1825.
8th March.

Will.
Copyholds.

" I give and devise all and every my Freehold Messuages, Lands, Tenements and Hereditaments, whatsoever and wheresoever, with their and every of their Appurtenances, unto and to the use of *Joseph Stonard, Holden Strutt and Thomas Gardiner Bramston*, Esquires, their Heirs and Assigns, for ever, but upon Trust that they the said *Joseph Stonard, Holden Strutt and Thomas Gardiner Bramston*, and the Survivors and Survivor of them, and the Heirs and Assigns of such Survivor, shall and do, and I do hereby direct and appoint, authorize and empower them the said *Joseph Stonard, Holden Strutt and Thomas Gardiner Bramston*, and the Survivors and Survivor of them, and the Heirs and Assigns of such Survivor, absolutely to sell by Auction and dispose of, not only all my said Freehold Messuages, Lands, Tenements and Hereditaments hereby devised to them as aforesaid, but also all and every my Copyhold or Customary Messuages, Lands, Tenements, Hereditaments and Premises, whatsoever and wheresoever, with their Appurtenances, (and which I have surrendered to the use of this my Will), and every part and parts thereof respectively, either together or in parcels, and either by public Auction or private Contract, unto any person or persons whomsoever who shall be willing to become the Purchaser or Purchasers thereof, for the best price or Prices in Money that can or may be reasonably had

Testator having surrendered some of his Copyholds to the use of his Will, and left others unsundered, devised all his Copyhold Messuages, Lands, &c. whatsoever and wheresoever, and which he had surrendered to the use of his Will: Held that the unsundered as well as the surrendered Estates passed by the Will.

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or obtained for the same respectively, and to convey and assure, or cause to be conveyed and assured, all and every my said Freehold Messuages, Lands, Tenements and Hereditaments, with the Appurtenances, unto the Purchaser or respective Purchasers thereof, as he, she or they shall direct or appoint, and also to cause and procure the Purchaser or respective Purchasers of my said Copyhold Messuages, Lands, Tenements, Hereditaments and Premises to be admitted thereto under or by virtue of this my Will or the Surrender to the use thereof as aforesaid."

The Testator then directed his Trustees to invest the Money produced by the Sale in Government or Real Securities, and, out of the Dividends and Interest thereof, to pay Annuities to his Widow and Daughters, and to his Son *William Waltham*, and, subject thereto, to assign and transfer the Securities amongst the Children of his Daughters: and he declared it to be his express desire that, in case his Son *William Waltham* should in any way attempt to disturb his Will by making any claim upon any part of his Estate, after such claim, his Trustees should immediately stop payment of his Annuity.

The Testator died in January 1811. He was, at the date of his Will and at his death, seised of certain Freehold Estates, and of two Copyhold Estates, one holden of the Manor of *Muckinghall* in *Essex*, and the other, of the Manor of *South Church* in the same County; but he had surrendered the former of them only to the use of his Will.

William Waltham, the Son and Customary Heir of the Testator, by his Will dated the 16th of October 1811,

gave the unsundered Estate to his Wife *Elizabeth Waltham*, and died shortly afterwards. The question was whether the unsundered, as well as the surrendered Copyholds, passed by the Will of *William Waltham*, the Father.

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Mr. Sugden, and Mr. Roupell, for the Defendant
Elizabeth Waltham :—

The Devise is limited to the Copyholds which *William Waltham*, the Father, had surrendered to the use of his Will. The words, “ and which I have surrendered to the use of this my Will,” are part of the description of the Property devised. He has put these words into a Parenthesis, because he has coupled the Copyhold with the Freehold. The Rule laid down in *Roe v. Vernon* (a) is that, where there is sufficient certainty before by way of description of the thing granted, as by giving to a Close a particular Name, &c. there a subsequent mistake, as the Tenant's Name, the number of Acres or the Rent, shall not hurt the Grant. But, where the Premises are first described generally, and afterwards a particular description is added, that shall restrain the general words. Here, as it is a general devise of all the Testator's Copyhold Messuages, Lands, Tenements and Hereditaments, and not a devise of any particular Messuage belonging to the Testator, and, as words which amount to a restriction are added, the Court is bound to consider them as restrictive. The Conjunction “ and ” being used here cannot alter the sense of the expression used. The Court must feel certain that no meaning was intended to be put upon the words, before the Heir can be excluded. *Gascoigne v. Barker* (b), *Wilson v.*

(a) 5 East, 51.

(b) 3 Atk. 8.

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Mount (c), Judd v. Pratt (d). This last Case was as strong a one for raising a case of Election as the present, and yet the Heir was not put to his Election.

Mr. *Hart*, Mr. *Agar*, Mr. *Heald*, Mr. *Preston*, Mr. *Garratt*, and Mr. *Miller*, for the Testator's Daughters, and other Parties to the Suit:—

The word "and" does not occur in the Cases which have been cited for the Widow; and the want of that word affords a real distinction between those Cases and the present one. The Cases of *Banks v. Denshaw (e)*, and *Rumbold v. Rumbold (f)*, are Authorities in our favour. Besides, the Testator has declared it to be his express desire that, if his Son should attempt to disturb his Will, the Trustees should cease to pay him the Annuity. It is quite clear that he meant to exclude him from making claim to any part of his Estate; and, therefore, to give all his Copyhold Estates, whether surrendered or not, to the Trustees; and there are Persons here who are entitled to have the Surrender supplied; for the first Trust is to pay Annuities to the Testator's Widow and Children.

Mr. *Sugden*, in reply:—

The only difficulty arises from the word "and;" for the Cases authorize the parenthesis to be put out of the question. The Devise is the same as if the Testator had said, "I give all my Copyhold Estates which I have surrendered to the use of my Will. I do not give all my Copyholds which are to be found any where, but those only which I have surrendered to the

(c) 3 Ves. 191. (d) 13 Ves. 168, and 15 Ves. 390.
(e) 3 Atk. 585; and 1 Ves. 63. (f) 3 Ves. 65.

use of my Will." This construction gives a meaning to every word that the Testator has used. It is a material circumstance in this Case, that the Testator did know that it was necessary to surrender his Copyholds to the use of his Will. In *Rumbold v. Rumbold*, no part of the Testator's Copyholds had been surrendered to the use of his Will; and, therefore, it was quite clear that the Court could come to no other decision than it did in that Case. In *Banks v. Denshaw* the facts are not stated in the Report; they are only glanced at in the Judgment; and Lord *Hardwicke* says that the subsequent part of the Will put the matter out of all doubt as to the Testator's intention. The Clause which directs the Trustees to stop payment of the Son's Annuity, does not mean that he is to be put to his election, but merely that he is to forfeit his Annuity. There can be no doubt that the Clause only means to restrict the Son from claiming such parts of the Estate as passed by the Will. Here he does not claim an Estate which passed by the Will. It is clearly settled that the Court will not supply a Surrender in favour of Grandchildren; and that, if it is called upon to supply it in favour of a Widow or Children, it will deny its aid to Persons more remotely related to the Testator.

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The VICE-CHANCELLOR:—

The question is, whether the expression, "and which I have surrendered to the use of my Will," used by the Testator after a general gift of all his Copyhold Estate whatsoever and wheresoever, was intended by the Testator as an Exception to the generality of the Gift, or as an Affirmation of a fact with respect to the subject of the Gift in which he appears to have been mistaken.

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Every expression is to be understood according to its natural and grammatical sense, unless a different intention appears from other parts of the Instrument. The natural and grammatical sense of this expression is plainly affirmative, and not exceptive. The copulative "and" distinguishes this Case from the Case of *Wilson v. Mount*. The Customary Heir must elect.

9th March.

OVEY v. LEIGHTON.

Answer.
Exceptions.

A Defendant cannot, by Answer, protect himself from answering fully, on the ground of his being a Purchaser for valuable consideration.

Where a Plaintiff takes no Exception to the Answer to the original Bill, he cannot take an Exception to the Answer to the amended Bill, upon a principle which would have applied equally to the Answer to the original Bill.

THE original Bill was filed for a Discovery and Partition. The Defendant by his Answer admitted that he had in his possession Title Deeds belonging to the Estate in question, but stated that he was a Purchaser for valuable consideration, and insisted that, for that reason, he was not bound to set forth a Schedule of those Deeds, as required by the Bill.

The Plaintiff did not take Exceptions to the Answer; but amended his Bill, and charged many particulars as to the Title to the Estate and the Deeds in the Defendant's possession.

The Defendant, by his Answer to the amended Bill, again insisted that he was a Purchaser for valuable consideration, and, as such, not bound to set forth a Schedule of the Deeds.

The Plaintiff excepted to this Answer, on the ground that it neither contained a full Answer as to the Title, nor a Schedule of the Title-deeds as required by the Bill. The Master over-ruled the Exceptions; upon which the Plaintiff excepted to his Report.

Mr. *Wakefield*, in support of the Exceptions, contended that, although a Purchaser for valuable consideration might by Plea protect himself from answering fully; yet that, if he submitted to answer, he must answer as to every particular interrogated to by the Bill.

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Mr. *Hart*, and Mr. *Perkins*, *contra*, insisted, first, that the Defendant, being a Purchaser for valuable consideration, was within the Exception to the general Rule, and might, by Answer, protect himself from answering fully, and cited *Jerrard v. Saunders* (a); and, secondly, that the Plaintiff, not having excepted to the Answer to the original Bill, could not maintain Exceptions to the Answer to the amended Bill, as to points which were applicable to the Answer to the original Bill.

The *Vice-Chancellor* held, first, that a Purchaser for valuable consideration, submitting to answer, and not protecting himself by Plea, must answer fully; and, secondly, that the Plaintiff having waived this Exception to the Answer to the original Bill, could not recur to it on the Answer to the amended Bill.

(a) 2 Vcs. jun. 454.

1825.
10th March.

HODGSON *v.* BUTTERFIELD.*Exceptions.*

Exceptions to an Answer containing in substance, but not *verbatim*, the Interrogatories not answered, will be overruled. But if the Defendant has submitted to answer, and his further Answer is referred back, he is too late to object to the Form of the Exceptions.

THE Plaintiff had excepted to the Answer. The Defendant submitted to the Exceptions, and put in a further Answer. The Plaintiff referred back the further Answer upon the old Exceptions; and the *Master* reported it insufficient. The Defendant then excepted to the Report. The Exceptions varied in expression, but contained, as the Plaintiff alleged, the substance of the Interrogatories which were not answered.

Mr. *Bligh*, for the Defendant, objected to the Exceptions, on account of their not containing the Interrogatories *verbatim*.

Mr. *K. Parker*, *contra*.

The VICE-CHANCELLOR:—

If the Plaintiff complains that a particular Interrogatory of the Bill is not answered, he must state the Interrogatory in the very terms of it, and cannot impose upon the Court the trouble of first determining whether the varied expressions of the Interrogatory and the Exception are to be wholly reconciled. But, as this Defendant has submitted to answer these Exceptions, he comes too late with the objection now made, and must answer fully.

WILKINSON v. WILKINSON.

1825.
11th March.

*Trustees'
Allowances.*

JOSHUA Wilkinson bequeathed, to his acting Trustees for the time being, the yearly sum of 5*l.* 5*s.* a piece, so long as they should respectively live and the Trusts of his Will should continue, as a small recompence for the care and trouble they might have in the execution of the Trusts, and appointed them his Executors.

Testator gave Annuities to his Trustees for their trouble in the execution of his Will, and died possessed of several Houses, let at weekly Rents. The Trustees are justified in paying a Person to collect these Rents, and do not, therefore, lose their Annuities.

Amongst other Property the Testator was entitled to about fifty Houses in London; thirty-four of which were let at weekly Rents. The Trustees employed a Person to collect those Rents. The *Master*, on their passing their Accounts before him, allowed them the Salary paid to such Collector. An Exception was taken to the *Master's* Report on account of that Allowance.

Mr. Garratt, in support of the Exception, relied on the Gift of the five guineas yearly to the Trustees as a recompence for their trouble; and also on the general doctrine of the Court, that the office of Trustee is gratuitous.

The VICE-CHANCELLOR:—

It does not appear to me that the Annuity of five guineas given to each Trustee, makes any difference in this case. It is given to them as a recompence for the care and trouble which will attend the due execution of their office; and, if it be consistent with the due execution of their office that they should employ a Collector to receive the Rent, they will still be entitled to the Annuity. A provident Owner might well employ a

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Collector to receive such Rent; and the labour of such a Collection cannot be imposed upon Trustees.

Exception over-ruled.

11th March.

TYLDEN v. HYDE.

*Power of Sale.
Executors.*

Testator directed his Real and Personal Property to be sold and divided amongst his Sisters; a Power to the Executors to sell the Real Property was implied.

THE question in this Cause was whether the Plaintiffs, who were the Executors of the late Sir *Samuel Auchmuty*, had power under his Will to convey to the Defendant an Estate which they had agreed to sell to him.

The Testator, by his Will, after giving several specific and pecuniary Legacies, disposed of the residue of his Property as follows:

“The residue of my Property, both Landed and Personal, I desire may be converted into Money, lodged in Government Securities, and divided into four Parts or Shares; the Interest of one Share to be given, during their lifetime, to each of my Sisters *Frances Montresor*, *Juliana Mulcaster*, and *Jane Tylden*, and to my Sister-in-Law *Henrietta Auchmuty*; on the death of either or all of my said Sisters or Sister-in-Law that may survive me, or, at my death, if one or more of my said Sisters do not survive me, the Share set apart for such Sister or Sisters and Sister-in-Law to be divided among all the Children of my said Sister or Sisters, and the Children of my said Sister-in-Law by my Brother *Robert Auchmuty*, with the exception of his second Son *Robert Mulcaster*

Auchmuty, in the following manner: Two thirds of such Share or Shares to be equally divided among the Sons of my said Sisters and Sister-in-Law, and one third equally amongst the Daughters. I request that *Richard Tylden, Esq.* and my Nephew Sir *Henry*, and Major General Sir *Thomas Montresor*, Captain *Mulcaster*, Royal Navy, and Sir *John* and Major *William Tylden*, will act as Executors to this my last Will and Testament."

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Three only of the Executors proved the Will and acted in the Trusts of it. In pursuance of those Trusts, they sold some of the Testator's Real Estates to the Defendant, who afterwards took objections to the Title, and refused to complete his Purchase, upon which the present Bill was filed. On the Title being referred to the *Master*, he reported that the Plaintiffs could make a good Title to the Estates, and that they could, by themselves, without the concurrence of any other Party, legally and effectually convey the same to the Defendant.

To this Report the Defendant excepted.

Mr. Sugden, and *Mr. Jacob*, in support of the Exceptions:—

The question as to a Power to sell Real Estates being given, by implication, to Executors, was discussed in *Bentham v. Wiltshire* (a). Where the Money to be produced by the Sale is not dedicated to the payment of Debts, the Executors have no power to sell Real Estates. The Rule laid down in *Bentham v. Wiltshire*, is, that the Executors cannot sell, unless Power is given

(a) 4 Madd. 44.

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to them, either expressly or by necessary implication. It is not enough to show that it would be more convenient to have the Sale made by the Executors than by the Heir at Law. As to what is required to raise what is called a necessary implication, Courts are now more strict; and there is nothing in this Case strong enough necessarily to imply a Power in the Executors to sell the Real Estate. In *Patton v. Randall (a)*, the words were "the whole Land and Houses, together with the Furniture and contents of the Cellar, shall be sold." These words are much stronger than anything in the present Will; because the direction to sell the Furniture along with the Houses, implied that they should be sold at the same time; and, as the Furniture must have been sold by the Executor, it was to be implied that he should sell the House also; yet the *Master of the Rolls* held that the Executor had not, in that Case, power to sell the Real Estate. No doubt convenience is always in favour of such a Power being exercised by the Executor; but no Argument can be derived from that. The Argument, that in order to distribute the Fund produced by the Sale it must be all in the hands of one Person, would apply to every Case of this kind; yet it is not allowed to prevail. Even where there is a Devise to a Trustee to sell, and a different Person is appointed Executor, if the Trustee should die, the Heir of the Trustee must sell, and the Executor cannot exercise the Power. Here the Testator has omitted to say by whom the Power of Sale is to be exercised; and, therefore, the Heir at Law, being the Person on whom the legal Estate is devolved by the Law, is the Party to exercise the Power, and must join in the Conveyance.

(a) 1 Jac. & Walk. 189.

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Mr. *Horne*, and Mr. *Boteler*, for the Plaintiffs, were stopped by the Court.

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The VICE-CHANCELLOR:—

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Where there is a general direction to sell, but it is not stated by whom the Sale is to be made, there, if the Produce of the Sale is to be applied by the Executors in the execution of their office, a Power to sell will be implied to the Executors.

Here the Produce of the Sale is to be confounded with the Personal Property, which must necessarily be divided by the Executors; and, by the Rule which I have stated, a Power to sell is therefore implied to the Executors.

Exceptions over-ruled.

1825.
14th March.

SHACKLETON v. SHACKLETON.

*Mortgagee.
Costs.*

Where a Legacy is charged upon Land, and the price of the Land is insufficient to pay the Legacy, a Mortgagee of the Devisee of the Land shall not be allowed his Costs in a Suit against him, and the Devisee for payment of the Legacy.

THIS was a Bill by a Legatee, whose Legacy charged upon Land, to have the Legacy raised by Sale. The Devisee of the Land charged with the Legacy had mortgaged it before the Bill was filed, and Mortgagee was necessarily made a Party to the Suit

It appeared upon the *Master's* Report, after a hearing made before him, that the Purchase-money would not be sufficient to pay the Legacy in full.

The Cause now came on to be heard for further directions, and the *Vice-Chancellor* refused to give Mortgagee his Costs out of the Price, stating that Legatee was not to be put to Expense by the imprudent conduct of the Devisee, or the folly of his Mortgage

14th March.

JONES v. LEWIS.

*Practice.
Production of
Instruments.*

Production of an Instrument in the Plaintiff's possession ordered upon Motion, supported by

Affidavit that the Defendant believed the Instrument to be forged, and that he could not fully answer the Bill before he inspected it.

THE Bill was filed for the specific performance of an Agreement, alleged to have been made by *Rees P.* deceased, on the Plaintiff's Marriage with one of his Daughters, for the conveyance of an Estate to the Plaintiff, but which, by a Will made subsequent to the execution of the alleged Agreement, he had devised to the Defendants.

The Defendants now moved that the Plaintiff might, within a week, leave the Agreement in the hands of his Clerk in Court, for their inspection, and that they might have three weeks further time to answer, after inspecting the Agreement.

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LEWIS.

This Motion was supported by an Affidavit made by the Defendants, one of whom was a Daughter of the Testator and had lived with him, in which they deposed that they had never heard, and did not believe that the Testator had ever entered into any such Agreement: that they believed it to be a Forgery; and that they were unable fully to answer the Bill, without, first of all, being permitted to have an inspection of the Agreement.

Mr. Lynch, in support of the Motion, relied on *The Princess of Wales v. The Earl of Liverpool* (a).

Mr. Horne, *contra*, said that the Case cited was an exception to the general rules of the Court; and that a Party could not be compelled to give a discovery without having an opportunity of stating, at the same time, his own Case upon the Record.

The VICE-CHANCELLOR:—

The doctrine that the Plaintiff must produce an Instrument stated in his Bill, previous to the Defendant's answering the Bill, where it is plainly necessary to enable the Defendant to make a full defence, is recognized in the Case of *The Princess of Wales v. The Earl of Liverpool*, and had been previously laid down in *The Practical Register* (b), and is obviously required by the first principles of Justice

(a) 1 Swan. 114.

(b) See p. 161.

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v.
LEWIS.

The Affidavit filed upon this application, where it is sworn that the Instrument is believed to be forged, establishes the necessity in the present Case.

Take the Order that the Defendants have a fortnight's time to answer after the Plaintiff shall have left the Agreement in the hands of his Clerk in Court.

14th March;
1st June.

HARTLEY v. RUSSELL.

Champerty.

THIS was a Suit for the specific performance of an Agreement.

Where a Creditor who had instituted Proceedings at Law and in Equity against his Debtor enters into an Agreement with the Debtor to abandon those Proceedings and give up his Securities, in consideration of the Debtor giving him a Lien on Securities in the hands of another Creditor, with authority to sue

such other Creditor and agreeing to use his best endeavours to assist in adjusting his Accounts with the holder of the Securities, and in recovering his Securities: Held that the Agreement does not amount to Champerty, but would have done so if it had stipulated that the Creditor should maintain the proceedings instituted by the Debtor against the holder of the Securities, in consideration of the Profits to be derived by the Debtor from the Suit.

The Bill was filed on the 7th of August 1824, and stated that, on the 12th of February 1824, the Defendant *Joshua Russell* filed his Bill in this Court against the Defendant *James Collins*, a Solicitor of the Court, setting forth that in the years 1811 and 1812 he, *Russell*, was extensively engaged in the sale and purchase of Estates; and that, in the beginning of the year 1812, he had occasion to borrow the Sum of 1,000*l.*, and applied to the Defendant *Collins* who agreed to lend him that Sum upon the Security of a Mortgage; that a Mortgage was accordingly prepared for securing repayment of 1,000*l.* and Interest on certain Estates, and that *Collins* charged 55*l.* for the Expenses of preparing the Mortgage Deed, and 150*l.* as his Commission for lending the Money; and, instead of

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paying the 1,000*l.* to *Russell*, paid him only 795*l.*, being what remained after deducting these charges; that afterwards, in the same year, *Russell* wanted to borrow the further Sum of 600*l.*, and again applied to *Collins*, who agreed to lend it upon the Security of another Mortgage, and, accordingly, prepared a mortgage-deed for that purpose; and, after deducting the Sum of 33*l.* for the Expenses of preparing this Deed, and 90*l.* as his Commission for lending this further Sum, paid over to *Russell* the Sum of 477*l.* only, instead of 600*l.*, and took the Mortgage to secure repayment of 600*l.* and Interest at five per cent; that *Russell* employed and consulted with *Collins* as his confidential Solicitor, and that various pecuniary transactions afterwards took place between them by discounting Bills and by *Collins* lending him Money, and that, from time to time, Securities were taken by *Collins* for the Sums in which *Russell* was so indebted to him, and that Annuities were also granted by *Russell* to *Collins*, and that, in the Accounts made up from time to time by *Collins* of the transactions between them, there were many improper charges, and many turns paid by *Russell* for which no credit was given, and that the Accounts were made with improper rests, so as to charge Compound Interest against *Russell*; that in 1817 a Commission of Bankrupt was awarded against *Russell*, and that *Collins* was a Mortgagee, under the various Securities already mentioned, at the time of the Bankruptcy, and alleged that large Sums were due to him, but never attempted to prove any Debt under the Commission; that, soon after *Russell* had obtained his Certificate under the Commission, he entered into an Agreement with his Assignees to take upon himself the Settlement of all his Accounts with *Collins*, and the Assignees agreed to convey to him all his Equity of Re-

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demption under the various Mortgages which he had executed to *Russell*, and this Agreement was authorized by the Creditors at a Meeting called for the purpose, and Deeds were executed by which the Agreement was carried into effect, and that *Russell* was thus entitled to any Balance which might, upon a just Settlement of Accounts, appear to be due from him to *Collins* at the time of the Bankruptcy; that *Collins* knew of this Agreement and adopted it, and carried on and continued his Transactions and Accounts with *Russell* as if he had not become a Bankrupt, and, in 1821, 1822 and 1823, delivered to *Russell* various Statements of Account and Bills of Costs containing exorbitant and improper charges, but that they were not signed; and praying that *Collins* might be decreed to deliver in, and sign, proper Bills of Costs; that such Bills might be taxed, and that an account might be taken of all the dealings and transactions between *Russell* and *Collins*, and that *Russell* might be let in to redeem the mortgaged estates upon payment of what should be found due on taking the Accounts.

The present Bill then stated that, on the 16th of February 1824, which was only four days after the first Bill was filed, the Plaintiff *James Hartley*, entered into the following Agreement with the Defendant, *Russell*.

“Whereas the said *James Russell* is and stands indebted to the said *J. Hartley*, in the Sum of 250*l.* for Money lent and advanced by said *J. Hartley* to and for the use of said *J. Russell*, together with Interest thereon from the 23d day of March 1823, and Costs, and, as a Security for the repayment thereof, the said *J. Russell* and also *Edward Wildes* signed an Under-

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taking to execute to the said *J. Hartley* a Transfer of a mortgage-debt due to them on an Estate at *Maidstone*; and whereas the said *J. Russell* is indebted to the said *J. Hartley* in the further Sum of 250*l.* on a Bill of Exchange dated the 20th of December 1822, drawn by the said *J. Russell* upon and accepted by one *J. Hopgood*, and payable three months after date, together with Interest thereon from the 23d day of March 1823 and Costs, which said Bill of Exchange the said *J. Hartley* hath proved under a Commission of Bankrupt issued against the said *J. Hopgood*, but no Dividend hath been received under the said Commission; and whereas the said *J. Hartley* hath commenced Proceedings at Law against the said *J. Russell* to compel Payment of the two several Sums of 250 *l.* and 250*l.*; and hath also instituted a Suit in Equity against the said *J. Russell* and *Edward Wildes* to compel a specific performance of this said Undertaking, and the same are now pending; and whereas the said *J. Russell* hath, for many years past, had various dealings and transactions with *James Collins*, of *Spital-square* in the County of *Middlesex*, Solicitor, and, in the course of such dealings and transactions, the said *J. Collins* hath advanced to the said *J. Russell* divers sums of Money, for securing which the said *J. Russell* hath, from time to time, deposited with the said *J. Collins* various Deeds and other Securities to a large amount, and, in the course of such dealings and transactions as aforesaid, the said *J. Collins* hath acted as the Attorney and Solicitor of the said *J. Russell*, and the said *J. Collins* hath made out and delivered to the said *J. Russell* several Bills of Fees and Disbursements for a large amount, which the said *J. Russell* conceives to be extravagant and overcharged, and the said *J. Collins* hath commenced Proceedings at

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Law against the said *J. Russell*, to recover the alleged Balance of his Account; and whereas the said *J. Russell* hath requested the said *J. Hartley* to institute Proceedings against the said *J. Collins* for an account of the various dealings and transactions between them, and for the delivery to the said *J. Russell* of the various Deeds and Securities in the possession of the said *J. Collins*, and to tax his several Bills of Costs; and whereas the said *J. Russell* hath requested the said *J. Hartley* to relinquish his claim on the mortgage-debt secured on the Estate at *Maidstone*, and to deliver up the Title Deeds thereto to the said *E. Wildes*, and to suspend all further Proceedings at Law and in Equity in respect of the said two several Sums of 250*l.* and 250*l.*, and, in consideration thereof, the said *J. Russell* hath proposed to execute such Deed or Instrument as may be deemed necessary to give to the said *J. Hartley* an effectual Lien on the several Securities now in the hands of the said *James Collins*, for the securing to the said *J. Hartley* the payment of the said two several Sums of 250*l.* and 250*l.*, together with Interest or Costs due or to accumulate thereon, which he the said *J. Hartley* hath consented and agreed to do, and to liberate the said *J. Russell* from custody in respect of the said Actions: Now these presents witness that, for the Considerations hereinbefore mentioned, the said *J. Russell* doth, for himself, his Heirs, Executors and Administrators, hereby covenant, promise and agree with the said *J. Hartley*, in manner following, (that is to say) that he the said *J. Russell*, his Heirs, Executors and Administrators shall and will, when hereunto required, execute to the said *J. Hartley*, such further Deed or Instrument, as may be deemed necessary or requisite, for giving effect to the Lien on the Securities now in the hands of

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the said *J. Collins* for securing to the said *J. Hartley* the payments of the said two several Sums of 250 *l.* and 250 *l.*, together with all Interest due and to accrue due thereon, and all Costs and Charges and Expenses incurred or to be incurred in respect thereof: And the said *J. Russell* doth hereby further covenant, promise and agree with the said *J. Hartley*, that he the said *J. Russell* shall not nor will impede or obstruct the said *J. Hartley* in taxing the Bills of Costs, and obtaining and balancing the Accounts of the said *J. Collins*, nor shall not nor will execute any Release to the said *J. Collins*, nor do any other act whatsoever to prevent the said *J. Hartley* from procuring the Securities now in the possession of the said *J. Collins*, but shall and will use his best endeavours to assist the said *J. Hartley* to adjusting and balancing the Account of the said *J. Collins*, and obtaining the Securities in his hands: And, for the consideration hereinbefore contained on the part of the said *J. Russell*, the said *J. Hartley* doth hereby agree to sign a Discharge to the said Actions: And it is hereby further agreed, between the said Parties hereto, that all Dividends or sums of Money which may be received under the Commission of Bankrupt against *J. Hopgood* shall be accounted for by the said *J. Hartley* with the said *J. Russell*: And lastly, for the performance of this Agreement on the part and behalf of the said *J. Russell*, he the said *J. Russell* doth hereby bind himself, his Heirs, Executors and Administrators unto the said *J. Hartley*, his Executors, Administrators and Assigns in the penal Sum of 600 *l.*"

The Bill then stated that the Plaintiff had, in all respects, performed the Agreement on his part; but that *Russell* had colluded with *Collins* for the purpose of depriving

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the Plaintiff of the benefit of the Agreement; and *Russell* intended to dismiss his Bill against *Collins* to release the Equity of Redemption of the various mortgages, and to impede and obstruct the Plaintiff in the *Collins's* Bills of Costs, and in the settlement of Accounts: And it prayed that the Agreement between *Russell* and the Plaintiff might be decreed to be specifically performed, and that the Plaintiff might be decreed to be entitled, under the Agreement, to the benefit of the Suit instituted by *Russell* against *Collins*, and that both *Russell* and *Collins* might be restrained by Injunction from dismissing the Bill in that Suit, and from executing any Releases or Deeds contrary to the Agreement between *Russell* and the Plaintiff, and for general relief.

To this Bill the Defendants *Russell* and *Collins* in general Demurred.

Mr. *Pemberton*, in support of the Demurrers:

The Agreement of which the Plaintiff seeks to obtain a specific performance, is such as cannot be countenanced or acted upon by the Court. Any Agreement to maintain a Suit for the sake of benefits to the Attorney prosecuting the Suit, is illegal. *Wood v. Downes* (a) a Case in which an Agreement of the same nature was held to be void, and was decreed to be cancelled.

Mr. *Wakefield*, for the Bill:—

Unless the Court is prepared to hold that an Equity of Redemption cannot be assigned, or that a Party files a Bill to redeem a Mortgage is thereby restrained

(a) 18 Ves. 120.

from creating any further Incumbrance on the Equity of Redemption, the Plaintiff must be held to be legally entitled to the specific performance of the Agreement set forth in the Bill. The Mortgages were taken for Advances from time to time for nominal Sums, but subject to an Account of the Sums actually advanced. It would be a new doctrine to hold that, because the Mortgages are of that nature, the Mortgagor cannot deal with the Equity of Redemption. Even if the Mortgages were usurious, the Mortgagor is still equally entitled to the benefit of his Equity of Redemption, and can have the benefit of it by filing his Bill to have the usurious demand cut down.

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Mr. Pemberton, in Reply:—

This is not at all a simple Bill to redeem. The object of the first Suit is to have Accounts opened, and to have Transactions rescinded on the ground of Usury. The Agreement is to give to *Hartley* the benefit of prosecuting that Suit. The Plaintiff in a Suit may give an Assignment of the Rights for which he sues, and leave the Assignee to prosecute those Rights. But this is an Agreement which gives a right to prosecute one particular Suit, and to continue a Litigation the Expenses of which are to be defrayed out of the Fund. It is all one Agreement; and, if not good in every part of it, it must fail altogether. So far as it gives the right to prosecute that Suit it savours of Champerty, and is illegal.

The VICE-CHANCELLOR:—

The Agreement in question recites that *Russell*, being indebted to *Hartley* in two Sums of 250*l.* each and Interest, secured in manner therein mentioned, and that *Hartley* having instituted Proceedings, both at Law and

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in Equity, to enforce the payment of the Monies due to him, it had been agreed between *Hartley* and *Russell* that *Hartley* should give up his present Securities, and should abandon his Proceedings at Law and in Equity, in consideration that *Russell* would give him an effectual Lien on the several Securities of *Russell* which were in the hands of *Collins*; and it is recited that *Russell* had requested *Hartley* to institute Proceedings against *Collins* for an Account of the various Dealings and Transactions between *Russell* and *Collins* and for the delivery to *Russell* of the various Deeds and Securities in the hands of *Collins*, and for the Taxation of his Costs; and *Russell* then covenants that he will, when required by *Hartley*, execute such further instrument as he shall think necessary for giving full effect to his Lien on the Securities in the hands of *Collins*, and that he will not impede or obstruct *Hartley* in taxing *Collins's* Costs, or in settling his Accounts, or in doing any other act for obtaining the Securities from *Collins*, but will use his best endeavours and assist *Hartley* in settling *Collins's* Accounts and in procuring his Securities.

There is here, therefore, no bargain, or colour of bargain, that *Hartley* shall maintain the Suit instituted by *Russell* against *Collins* in consideration of sharing in the Profits to be derived to *Russell* from the success of that Suit, which is essential to constitute Champerty. It is, in effect, nothing more than an Agreement by *Russell* to assign to *Hartley* his Equity of Redemption in the Securities held by *Collins*, in exchange for the prior Securities which *Hartley* had held. The Covenant that *Russell* would not impede or obstruct *Hartley* in the taxation of *Collins's* Costs, and in the settlement of *Collins's* Accounts, and the recital that *Russell* had re-

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quested *Hartley* to carry on Proceedings against *Collins*, import the intention of the Parties that *Hartley* should have authority to act against *Collins* as the Attorney and in the name of *Russell*. But this is a legal and common Provision in the case of the Assignment of a Debt or Security.

The specific Relief sought by this Bill is however extremely singular; that *Russell* shall not dismiss his Bill against *Collins* and that neither *Russell* nor *Collins* shall do any act in contravention of the Agreement between *Hartley* and *Russell*. The Plaintiff ought, as Assignee of the Equity of Redemption of the Securities of *Russell* in the hands of *Collins*, to have prayed the Accounts of all Transactions between *Russell* and *Collins*, and a Redemption by the Plaintiff upon payment of what should be due in case *Russell* should not pay to the Plaintiff the amount of what was due to him from *Russell*.

But the question upon Demurrer is, not whether the Plaintiff is entitled to all the relief prayed, but whether, upon the Case made by the Bill, he may, under the Prayer for general Relief, be entitled to some Relief. These Demurrers must therefore be over-ruled.

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18th and 19th
March.

GILBERT v. WETHERELL.

*Advancement.
Release of Debt.*

A Father lent a sum of Money to his Son to enable him to engage in Trade, and took his Promissory Note for it; and afterwards persuaded his Son to continue the Trade against his inclination, whereby the Son suffered great Losses. The Father on his death-bed caused the Promissory Note to be burned, and died intestate; Held, that the burning of the Note amounted, in Equity, to a Release of the Debt, and that the Sum which remained due upon it was an Advancement to the Son.

THOMAS WETHERELL died intestate, leaving the Plaintiff *Mary* the Wife of *P. Gilbert*, and the Defendants, *Charles* and *Thomas Wetherell* his three Children and only next of kin. This Suit was instituted for the Administration of his Estate.

By the Decree made at the hearing of the Cause it was referred to the *Master* to inquire whether the Intestate made any Advancements to his Children, and under what circumstances they were made, with liberty to state special circumstances and to make a separate Report.

The following facts appeared by the Examinations taken before the *Master*, under the Decree. In November 1805, the Intestate lent the Defendant *Thomas Wetherell* 10,000*l.* to assist him in forming a Partnership in the business of a Sugar-refiner, and took his Promissory Note for the repayment of that Sum on demand. *Thomas Wetherell*, from time to time, paid various Sums, amounting altogether to 3,538*l.*, in reduction of the 10,000*l.* On the 31st of December 1811, he signed an Account which stated a balance of 9,128*l.* 7*s.* 6*d.* to be then due from him to the Intestate. In the year 1812, owing to heavy Losses which he had sustained in a separate Trade carried on by him, he was obliged to stop payment, and, to prevent a Commission of Bankrupt being sued out against him, assigned over all his Stock in Trade and other convertible Property for the

benefit of his Creditors, on their agreeing to give him time for the liquidation of their various Demands. A great part of the Stock in Trade thus assigned, consisted of Sugars which, from the then state of the Market, could not be sold but at very great disadvantage; but it was hoped that sufficient time would be given to have it advantageously disposed of. Before, however, a favourable change took place in the Markets, the Creditors became so urgent for the immediate conversion of the Property into Money, that, in order to avoid the Loss which an immediate Sale would have occasioned, the Intestate, to relieve his Son, made an arrangement with the Creditors, by which he accepted Bills of Exchange for the full payment of their several Debts, with Interest, by four Instalments; and the whole of the Sugar and other Property of the Son was transferred and delivered over to the Father. The whole Property thus transferred to the Intestate, was sold under the most favourable circumstances which the situation of the Parties admitted of; but, instead of any Surplus remaining to go in diminution of the Debt due to the Intestate himself, he remained greatly in advance, on account of the Payments made by him to the Creditors.

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On the 12th of March 1814, which was about ten days previous to his death, and during his last illness, the Intestate desired his Daughter, the Plaintiff *Mary Gilbert*, who was in attendance upon him, to bring him his Pocket-Book; which she accordingly did. The Intestate then took the Promissory Note for 10,000*l.* out of the Pocket-Book, and put it into the hands of *Mrs. Gilbert*, and desired her to burn it; which she immedi-

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ately did in the Intestate's presence. When it was burnt, the Intestate said, "Now *Thomas* owes me 11,000*l.*"

Thomas Wetherell, in his Examination before the Master, stated that it was in consequence of the urgent desire of the Intestate that he had engaged in the business of a Sugar-refiner; and that, in August 1809, finding that it was a losing concern, he became desirous of retiring from it; but that the Intestate urged him to continue it; that, at the earnest desire and intreaty of the Intestate, and to his own manifest disadvantage, he, after much hesitation, continued the Business, and sustained such heavy Losses in it, that, in November 1811, his share of the Losses exceeded the amount which remained due in respect of the Promissory Note for 10,000*l.* He also stated that the Intestate, when he took a Transfer of all his Stock in Trade, agreed to take the Surplus (if any) after payment of all the other Creditors, in discharge of the Debt due to himself; and that this arrangement was always looked upon, and spoken of by the Intestate as an extinguishment, or satisfaction of the Debt due to him; that the burning of the Promissory Note on his death-bed was Evidence that he considered it satisfied; and that the Intestate, at various times, in conversations with different persons, acknowledged that the Examinant's Losses in Trade were owing to his (the Intestate's) fault and obstinacy, as he would have the Examinant persist in continuing the Trade, contrary to his own inclination; but that the Examinant should not be a sufferer. Several Witnesses examined in the Cause on behalf of the Examinant, proved that the Intestate had used some such expressions in conversation.

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The *Master*, by his separate Report, stated that the Plaintiffs had brought in a charge against the Defendant *Thomas Wetherell*, by which they charged that he had received from the Intestate, his Father, in his life-time, several sums of Money by way of Advancement, and that, on the 31st of December 1811, the Defendant *Thomas Wetherell* signed an Account, by which it appeared that the Sum of 9,128*l.* 7*s.* 6*d.* was then due from him to the Intestate; but the *Master* reported that this Sum of 9,128*l.* 7*s.* 6*d.*, or any part of it, was not an Advancement by the Intestate to the Defendant *Thomas Wetherell*, within the 22 & 23 Charles 2, c. 19.

Exceptions were taken to this Report: but, when they came on to be argued, the *Master* had not made his general Report; and, on its being suggested that the *Master*, though he had not reported the Sum of 9,128*l.* 7*s.* 6*d.* to be an Advancement, might report it to be a Debt due from the Defendant *Thomas Wetherell* to the Intestate's Estate, the Exceptions were ordered to stand over until the *Master* should have made his general Report.

The *Master* did not, by his general Report, state this Sum to be a Debt; and Exceptions were also taken to the general Report.

The Exceptions to the *Master's* Reports now came on to be argued.

Mr. *Sugden*, and Mr. *Stuart*, for the Plaintiffs, and Mr. *Horne*, and Mr. *Garratt*, for the Defendant *Charles Wetherell*, in support of the Exceptions, insisted that

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the 10,000 *l.*, or what remained unpaid in respect of it, must be considered, either as an Advancement by the Intestate to the Defendant *Thomas Wetherell*, or as a Debt due from *Thomas Wetherell* to the Intestate's Estate; that the burning of the Promissory Note did not amount in Law to a Release of the Debt; that, as to the Losses in the Sugar-refining Business, the Intestate did not mean to consider them as affecting the Debt due to him; because the Account stated in November 1811, by which the Balance of 9,128 *l.* 7 *s.* 6 *d.* appeared in favour of the Intestate, was stated after those Losses had occurred; that, there having been not only no surplus remaining towards payment of the Debt to the Intestate after he had paid the other Creditors out of his own Monies, but an increase of the Debt due to him, it was impossible to consider the Transfer of the Stock in Trade to him as a satisfaction of the Debt; and that, if the burning of the Note could be held to amount in Equity to a Release of the Debt, it must then be considered to be an Advancement.

Mr. *Heald*, and Mr. *Roupell*, for the Defendant *Thomas Wetherell*, insisted that the whole transaction and the expressions used by the Intestate, showed that he considered the Debt as satisfied, and not chargeable, in any shape, against *Thomas Wetherell*; and therefore, that the *Master* had rightly reported that it was neither a Debt nor an Advancement.

The *Vice-Chancellor* said he must hold that the circumstances under which the Note had been destroyed amounted to an equitable Release of the Debt; but that the Sum of 9,128 *l.* 7 *s.* 6 *d.*, the Balance which appeared

due, in respect of the Sum for which the Note was given by the Account stated in December 1811, was to be considered as an Advancement.

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The Decree allowed those Exceptions which proceeded on the ground that the 9,128*l.* 7*s.* 6*d.* had not been reported an Advancement; referred it to the *Master* to take an Account of what was due from *Thomas Wetherell* to the Intestate at his death, and directed him to take the Balance of 9,128*l.* 7*s.* 6*d.* on the stated Account, as part of the Debt; and declared that the amount of the Debt at the Testator's death was an Advancement to the Defendant *Thomas Wetherell*.

In this Case the Plaintiffs examined the Defendant, *Thomas Wetherell*, on Interrogatories in the *Master's* Office; but declined to read his Examination; and, at the hearing of the Exceptions, objected to his Examination being read, as it had not been used by them in the *Master's* Office.

Evidence.

The *Vice-Chancellor*, after communicating with the *Master*, stated that by the practice of their Offices this Examination was Evidence before the *Master* upon the Matter referred to him, and might be read by the *Master*, although the Party who exhibited the Interrogatories declined to use it. *His Honor* therefore allowed the Defendant *Thomas Wetherell's* Examination to be read.

If a Party in a Cause examine another Party before the *Master*, this Examination may be read by the *Master* as Evidence upon the matter referred to him, although the Party who examined declined to use it before the *Master*.

1825.
22d, 23d &
28th March.

KNYE v. MOORE.

Deed.
Seduction.
Turpis Con-
tractus.

A Bond for securing a Provision for a Woman who had been seduced by the Obligor, and for her Children, given after cohabitation determined, is good, notwithstanding the Obligor was married when the connection commenced.

THIS Case was first brought before the Court upon Demurrer; and is reported *ante* 1 vol. 61. The Bill was afterwards amended, and the Cause now came on to be heard upon Bill and Answer. It appeared that the Deed alluded to in the former Report was a Bond, which the Defendant executed to *T. H.* his confidential Solicitor, for securing 100*l.* per annum to the Plaintiff *Sophia Knye*, for her Life, if she should survive the Defendant, and 500 *l.* to each of her Children, on their attaining the age of twenty-one, with Interest in the mean time. Two of the Children having afterwards died, the Defendant got possession of the Bond, and destroyed it; and then executed another Bond to *T. H.* by which he reduced the Mother's Annuity to 50 *l.*, but made the same Provision for the Children as before.

The Mother having afterwards refused to comply with a request, made to her on the Defendant's behalf, to leave the place in which she had resided ever since she had quitted the Cottage, and to remove to a greater distance from the Defendant's House, the Defendant obliterated so much of the last Bond as related to her Annuity.

The object of the amended Bill was to compel the Defendant to execute another Bond to the same tenor as the first, or at least as the second.

The Answer asserted that the first Bond was executed during the cohabitation, and before any separation

ween the Plaintiff *Sophia Knye* and the Defendant in contemplation.

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Knye
v.
Moore.

Mr. Sugden, and Mr. Spurrier, for the Plaintiff, mented strongly upon the conduct of the Defendant cited *Cary v. Stafford* (a), and *Atkins v. Farr* (b).

Mr. Lovat, and Mr. Stinton, for the Defendant:—

has been said, for the Plaintiff, that this is a Case which the Defendant was bound to make a Provision for the Mother and Children. Undoubtedly he was bound to provide for the Mother, by moral obligation, and for Children, by Law. But this is not the case of a Provision to be enforced in a Court of Equity. There is nothing executory here. No Agreement is recited; but there are Bonds actually executed. The first Bond must be put out of the question, and the Argument confined to the second only. No doubt, if a Bond is given after cohabitation, it will be enforced in a Court of Equity; and, if the Obligor gets possession of and destroys the Bond, Equity will enforce the giving of a new one. But the circumstance of the Defendant being a married Man makes the Case entirely different. There is not a single instance of relief being given, either at Law or in Equity, where one of the Parties was a married Man. The Cases cited by the Plaintiff's Counsel are not disputed; but they do not appear that any one of the Parties in those Cases was married. With respect to the second Bond there is no doubt that it was given after the cohabitation ceased. But on that point, *Priest v. Parrot* (c) is conclusive. If this Bond is bad as to the Mother, it is also bad as to the Children; for there is no Case in which

(a) Amb. 520.

(b) 1 Atk. 287.

(c) 2 Ves. 160; and see Belt's Supplement, 313.

1845.

KITE
v.
MOORE.

a Deed which is bad in part can be good for the remainder. Suppose a Bond was given for securing 1,000*l.* to A. if she committed Murder, and to secure a Provision for the natural Children of the Obligor by A.; such a Bond could not be enforced. If then this Bond is bad as to the Mother, it cannot be enforced as to the Children. Under these circumstances, and upon the authority of *Priest v. Parrot*, this Bill must be dismissed.

Mr. Sugden, in reply :—

The whole of the Argument for the Plaintiff rests upon *Priest v. Parrot*. Now if there ever was a Case in which a Court of Equity would refuse relief, it was that Case. It was quite clear that the Provision was for continued cohabitation. Lord Hardwicke says, "When a Man takes and keeps a Mistress under the nose of his Wife, who thereupon leaves her Husband, that is such a crime as stares every one in the face; and that is this Case." It is fairly deducible from the Judgment that the Defendant, before the separation, made the Settlement, in order to induce the Plaintiff to continue to live with him. In no other Case has the circumstance of the Man being married been brought under the consideration of the Court. In Lord Annesley's Case the Dates follow each other so closely, that it is probable that he was married. In the House of Lords it is treated as a valid transaction, if the Deed was properly executed. The Defendant in this Case was bound to make a Provision for this Woman, and he was bound by legal obligation to provide for the Children. If the Mother of illegitimate Children is unprovided for, this Court will give the Provision for the Children to the Mother. Supposing this Bond had been given during cohabitation, it would have been legal as to the Children;

for, if he had abandoned them, the Law would have compelled him to provide for them. He could not effectually provide for the Children, unless he provided for the Mother, under whom they were to be brought up; and it makes a material distinction where the Provision is not to take place until his death, because he might leave the Mother what he pleased. The Plaintiffs do not ask a Court of Equity to give them the Money due on the Bond; but, as there was a Bond actually executed, deposited with a third Person and declared to be a Deed remaining with that Person in Trust, this Bill is to compel the Defendant to place the Plaintiffs in the same situation as they stood in before he destroyed that Deed: and whether the new Deed can or cannot be recovered upon, will be a question hereafter to be decided in a Court, either of Law or of Equity. It has been decided at Law that a Deed may be good in part, and bad in part (e). There the Statute declared the Deed bad; but it was declared good as to part; and, therefore, the first Bond, if void as to the Mother, was good as to the Children. Then, as to the second Bond. The cancellation of the first was a good consideration for the second; for the getting rid of an infirm Security has often been held to be a good consideration for a valid one (f); and, as the cohabitation had ceased at the date of this second Bond, it is clear that it is good, both at Law and in Equity. *Priest v. Parrot* has nothing to do with the Case, because there the Security was given during the cohabitation.

1823.

KYTE
v.
MOORE.

After this Case had been argued, the *Vice-Chancellor* referred to the entry, in the Registrar's Book, of the

(e) *Mouys v. Leake*, 8 T. R. 411.

(f) See *Cuthbert v. Huley*, 8 T. R. 390; *Barnes v. Hedley*, 1 Taunt. 124; *Wright v. Whetler*, 1 Camp. 165, n.b.

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KNYE
v.
MOORE.

Cause of the *Marchioness of Annandale v. Harris*, and to the Record of *Priest v. Parrot*; and now delivered Judgment as follows:

28th March.

Upon reference to the Record itself, in *Priest v. Parrot*, it does not appear, either upon the Pleadings, or in the Depositions, whether the Security in that Case was given during the cohabitation of the Parties, or after the cohabitation determined; and it does not, therefore, necessarily follow that the Judgment in that Case did proceed upon the distinction, which the Reporter attributes to Lord *Hardwicke*, between the case of an unmarried and a married Man. It is further to be observed that, upon reference to the Registrar's Book in the Case of *Annandale v. Harris*, it does not appear whether Lord *Annandale* was or not a married Man at the time of his cohabitation with Miss *Harris*; and it seems manifest that such circumstance formed no ingredient, either in the Argument or the Judgment. In the Case of *Priest v. Parrot*, Lord *Hardwicke* is not reported to have said that there can in Equity be a different principle upon this subject from that which prevails at Law; and he is made to give, as a reason for refusing relief there, that an Action could not be maintained upon such a Bond at Law.

I think it, therefore, the proper course in this Cause to send a Case to a Court of Law for its opinion upon the point, whether the circumstance of the Defendant's being a married Man at the time of cohabitation with the Plaintiff, does, or not, form a good ground of defence at Law to an Action upon such a Bond. By stating the Bond to have been given for an immediate Annuity, and not for an Annuity to commence at the death of the Defendant, and

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by stating the Annuity to be in arrear, there will be no difficulty in obtaining the opinion of a Court of Law upon the point. Let a Case be stated, therefore, for the opinion of the Court of Common Pleas accordingly; and reserve the consideration of further directions and of Costs until such opinion is obtained.

1825.

KYRE
v.
MOORE.

OCKLESTONE v. BENSON.

14th April.
1st June.

THIS was a Bill for an Account by the Assignees of a Bankrupt against an alleged Debtor. The Defendant put in the following Plea:—

Bankrupt.
Pleading.

“ That by the Statute made and passed in the fifth year of the reign of his Majesty King Geo. 2, intituled, *An Act to prevent the committing of Frauds by Bankrupts* (a), it is provided that no Suit in Equity shall be commenced by any Assignee or Assignees without the consent of the major part in Value of the Creditors of such Bankrupt who shall be present at a Meeting of the Creditor pursuant to Notice to be given in the *London Gazette* for that purpose: And this Defendant doth aver that the said Bill was filed by the Plaintiffs, as the Assignees of the Estate and Effects of the said Bankrupt *Thomas Cassidy*, without the consent of the major part in Value of the Creditors of the said Bankrupt present at a Meeting of the Creditors pursuant to Notice given in the *London Gazette* for that purpose: And this Defendant doth therefore plead the matters aforesaid, &c.”

To a Bill by Assignees of a Bankrupt against a Creditor, a Plea that the Suit was not instituted with the consent of the Creditors at a Meeting, pursuant to the 5 Geo. 2, c. 30, s. 38, was allowed.

(a) C. 30, s. 38.

1825.

OCCLESTONE
v.
BAXSON.

Mr. Lowndes, in support of the Plea :—

It is but reasonable that the Assignees should, in the outset, have the sanction of the Creditors. *Ex parte Whitchurch* (a) decided that the Creditors cannot give a valid, general authority to Assignees to institute Suits but that there must be a Meeting to sanction each Suit. *Wilkins v. Fry* (b). There is, indeed, a Case, *Franklyn v. Fern* (c) in *Barnardiston's Reports*, (a book of no authority), in which it is stated that any Creditor may, of his own authority, institute a Suit at the peril of Costs.

Mr. Pemberton, for the Bill :—

The Case of *Franklyn v. Fern* is good Law, and proceeds on the principles laid down in *Elmslie v. Macaulay* (d), and other Cases, where there is collusion between the Assignees and the Debtor. In a Case of *Godfrey v. Langham* in this Court in July 1822, which is not reported, the very point now in question was decided, by overruling a Demurrer which was put in on the ground that the consent of the Creditors to the Suit was not alleged in the Bill pursuant to the stat. 1 Geo. 4, c. 119, s. 11.

This Case stood for Judgment; the *Vice-Chancellor* wishing to ascertain whether he had any Note of the Case of *Godfrey v. Langham*.

THE VICE-CHANCELLOR :—

I do not find, by any printed Report, that this point has ever been decided. It is said that it was in some measure touched upon in a Case before me of *Godfrey*

(a) 1 Atk. 90.
(c) Barnard. 30.

(b) 1 Mer. 244.
(d) 3 Bro. C. C. 624.

v. Langham, but I have no Note of that Case. If the Creditors are not bound by the result of a Suit which is commenced by the Assignees without the consent of the Creditors, then it is not fit that the Defendant should be vexed by a Suit which, at the pleasure of the Creditors, may be to him fruitless. And, if the Creditors are bound by such a Suit, then it is fit that a Plea should be favoured which is in furtherance of the purposes of the Statute.

Plea allowed.

1825.
OCCLESTONE
v.
BENSON.

GRAY v. CHAPLIN.

15th and 27th
April.

THE Act of Parliament under which the *Louth Navigation* was made, authorized the Commissioners appointed for putting the Act into execution to borrow Money on the Security of the Tolls; and enacted that, when the Money so borrowed, or a competent part of it, should be paid off, the Commissioners should reduce the Tolls; and empowered the Commissioners, from time to time, to lease the Tolls for any term not exceeding seven years.

Pleading.

On the 27th of October 1777, an Order or Agreement was entered into between a certain number of the then acting Commissioners, and *Charles Chaplin*, who was himself one of the Commissioners, which, after reciting that public Notice had been given by Advertisement,

One of the Shareholders of a Canal is entitled to file a Bill on behalf of himself and the other Shareholders, to set aside an Agreement made by the Commissioners of the Canal contrary to the Provisions of the Act under which the Canal was made; because whatever benefits may be reserved to the

Shareholders by the Agreement, they must all be considered as being interested in having the directions of the Act complied with.

1825.

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v.
CHAPLIN.

pursuant to the directions of the Act, that a Meeting would be held for the purpose of letting the Tolls, but that no one appeared to take the same, and that, at a subsequent Meeting, Mr. *Chaplin* had proposed to advance all the Money necessary for the Repairs of the River, and to keep the same in good Repair, subject to the order and directions of the Commissioners for the time being, and to keep down the Interest on all the Money borrowed, by paying to every Subscriber Interest at five per cent, and to pay all Officers' Salaries and all other Expenses attending the Works, provided the Commissioners would invest him with proper powers, and assign to him the benefit of the Tolls for a term of ninety-nine years, and agree to join with him in obtaining an Act of Parliament, at his Expense, confirming the Agreement, whenever thereunto by him required, and that such Proposal was approved of and accepted by the greatest part of the Subscribers at the Meeting, and had since been approved of by all other the Subscribers, except three persons particularly named: it was thereby ordered and agreed, for the good of the Navigation, and as the only method for raising the Money necessary to put the same into proper and effectual Repair, that the Canal or Cut and the Navigation thereof, with all the Tolls arising from the same, should be vested in Mr. *Chaplin* for a term of ninety-nine years, to commence from the 24th of June then last; and Mr. *Chaplin* agreed to accept the Trust, and do all the Works which should be ordered to be done by the Commissioners for the support of the Navigation; and to pay the Interest of the Money borrowed at five per cent, with Officers' Salaries, &c. &c.: and it was further ordered that seven of the Commissioners should be appointed to enter into an Agreement with Mr. *Chaplin* to carry the Order into execution.

A Memorandum of this Order or Agreement was entered in the Proceedings of the Commissioners: but no more formal Agreement or Lease was made; nor was any Act of Parliament obtained to confirm it. But, under this Order or Agreement, Mr. *Chaplin* was put into receipt of the Tolls; and he and his Representatives had ever since been in the receipt of them.

1825.

GRAY.
v.
CHAPLIN.

The Bill was filed by two Shareholders of the Navigation, on behalf of themselves and all the other Shareholders except the Defendants. The Defendants were all the acting Commissioners under the Act, and the Personal Representatives of Mr. *Charles Chaplin*, one of whom happened to be also a Commissioner. It alleged that the Income of the Tolls greatly exceeded all the Payments which were to be made under the Agreement; and contended that the Surplus ought to have been applied in discharging the Principal Sums which had been lent to the Commissioners, whereby the Tolls would have been reduced, and the Public might have had the benefit of the Canal, either without Toll, or at more reasonable and reduced rate; instead of their being kept up, as they had been, at the highest rate allowed by the Act: and it prayed that the Agreement might be declared to be void as an absolute Assignment, and to stand as a Security only for payment of the Interest of the 100*l.* Shares, and the Expenses of the Canal, and then of the Principal of the Shares: that an Account might be taken of the Tolls received by Mr. *Chaplin* and his Representatives, and of the Sums expended by them, in paying the Interest of the Shares, and repairing the Canal; and that the Balance might be paid over to a person to be appointed by the Court; and that a Receiver might be appointed to collect the Tolls.

1828.

GRAY

v.

CHAPLIN.

To this Bill a general Demurrer was filed by Mr. *W. Chaplin*, who was made a Defendant as one of the acting Commissioners.

Mr. *Fane*, in support of the Demurrer:—

1. The Plaintiffs are not competent to sustain a Suit in the form adopted; for they and the other persons on whose behalf the Suit is instituted have not a common Interest. The Bill states that an Arrangement was made with Mr. *Chaplin* in the year 1777, by which the Shareholders became entitled to receive Interest at 5*l.* per cent upon each 100*l.* Share. If every Shareholder were to take his Shares into the Market, he would be able to obtain 100*l.* for each Share. If the Plaintiffs succeed, he would not be able to get more; and, therefore, this Suit cannot be advantageous to the other Shareholders on whose behalf it is instituted.

2. This Agreement was originally a fair one, and binding on all the persons who were Parties to it. These Plaintiffs were, in fact, Parties to the Agreement, because they are Holders of Shares which were then in existence. As they do not state that they claim under any one of the three Shareholders who opposed the entering into the Agreement, it is fair to infer that they claim under some of those who assented to it. But, if they had not claimed under those who were originally Parties to this Agreement, they are bound by acquiescence, and are not now at liberty to say they will get rid of the Agreement. There is no pretence throughout the Bill that the facts on which they found their claim have come lately to their knowledge: and, if that were the case, they are bound by the knowledge of the persons under whom they claim.

g. Suppose these Plaintiffs are entitled to sue, their rights ought to be enforced at Law. The Commissioners act under public authority; and the proper mode to compel them to do their duty is by Mandamus.

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v.
CHARLES.

Mr. Hart, Mr. Sugden, and Mr. Roupell, in support of the Bill:—

The Commissioners had no authority to demise these Tolls for a longer term than seven years. There is no provision in this Agreement for paying off the Principal of the Sums borrowed; but the Rent reserved is only sufficient to pay Interest upon the Sums due at 5 l. per cent. The Bill is founded on the right of the Plaintiffs to have the Trusts of the Act carried into execution, and they have a right to use the Names of the other Shareholders for that purpose; for it is not in their power to say that they are content with the Commissioners being guilty of a breach of duty. The fair inference is that every one of the Shareholders is interested in having the Trusts performed. This Agreement is not a beneficial one to the Shareholders; for if Capital were locked up for half a century, it might now produce more than 5 l. per cent. Besides, considering the various events that may take place in that time, who can tell that the value of Money may not be greatly increased. Several of the Commissioners are stated to have entered into the Agreement; but it is not said that any of them executed it except the two mentioned in the Bill. The Commissioners are merely individuals named in the Act. If they decline to execute the Trusts, the remedy must be in Equity. A Mandamus would not be effectual; for it could not compel the taking of the Accounts, or the carrying of the Trusts into execution. The Bill does not impose on the other Share-

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GRAY
v.
CHAPLIN.

holders the necessity of taking the benefit of the Suit. They are at liberty to come in and take the benefit of the Decree, or not, as they think proper. In a Creditor's Suit, some of them might wish to have the Administration of the Assets delayed, but the Court would not listen to any application of that nature. By the Memorandum it appears that the Parties were conscious that they were doing an illegal act; for it contains a stipulation for an application to Parliament to confirm the Agreement. No such application was ever made. Acts of Parliament of this nature are considered as a species of contract between the Public and the Undertakers of the Work. *Attorney-General v. Brown (a)*.

The VICE-CHANCELLOR:—

In order to enable a Plaintiff to sue on behalf of himself and all others who stand in the same relation with him to the subject of the Suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent. The several persons who advanced Monies upon the Credit of these Tolls, must be taken to have advanced such Monies in the confidence that the powers of management of the Tolls, which were vested in the Commissioners, would be duly exercised according to the directions of the Act; and a Bill which has for its object the due exercise of those powers and to avoid a breach of Trust, must be intended to be in its nature beneficial to every Shareholder. I am of opinion, therefore, that the Plaintiffs were entitled to file this Bill on behalf of themselves and all other the Shareholders who were not Defendants.

(a) 1 Swan. 265.

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GRAY
v.
CHAPLIN.

It is next argued that the Plaintiffs are not entitled to object to this Agreement, because the persons who at the time of the Agreement were possessed of the Shares which they now hold, were Parties to this Agreement. This fact does not appear upon the Bill. The only reference to it is by recital in the Agreement; and the recital in the Agreement, if it were precise, is not equivalent to an averment of the fact. But the recital does not import that all the Shareholders, except the three persons named, were Parties to the Agreement. It states that Mr. *Chaplin's* proposal had been accepted and approved by the greatest part of the Subscribers present at the Meeting, and had since been accepted and approved of by all other the Subscribers. This may well mean all other the Subscribers not present at the Meeting. The Agreement in question would not, however, have been warranted if every Shareholder had been an actual Party to it; because it is not alone the Interest of the Shareholders, but the Interest of the Public which is affected by it. This Agreement renders all Reduction of the Rate of the Tolls, as well as all Reduction of the Debt, impossible for a term of ninety-nine years, whatever may be the Produce of the Tolls; whereas the Act of Parliament requires that the Rate of the Tolls should be reduced whenever the state of the Debt will admit of it.

Demurrer over-ruled.

1865.
15th April.
1st June.

THRING v. EDGAR.

*Pleading.
Negative Plea.
Plea & Answer.*

To a Creditor's Bill the Defendant pleaded that the Deceased was not indebted to the Plaintiff at her death, and accompanied the Plea by an Answer denying the existence of the Debt, and the manner in which it was alleged to have been contracted: Held that the Answer overruled the Plea.

An Answer to a Negative Plea must be confined to Facts specially charged as Evidence of the Plaintiff's Title.

THIS was a Bill, filed by a Creditor of *Martha Butt* deceased, against her Heir at Law, Devisees and Executors for an Account and Payment of the Plaintiff's Debt.

The Defendant *Edgar*, one of the Devisees and Executors, put in the following Plea and Answer:—

"To all the Discovery and Relief sought from or prayed against this Defendant, other than and except so much of the said Bill as seeks a Discovery whether *Martha Butt*, the Testatrix in the said Bill of Complaint named, was not, in her lifetime and at the time of her death, indebted unto the said Complainant in the Sum of 215*l.* and upwards, or some other and what Sum, for Goods sold, and Money lent, paid out and advanced by him to the said Testatrix to and for her use, and by her order, and on her account, in her lifetime, or in and by some and what manner and means, and whether the same Debt, or part and how much thereof, and whether or not with some arrear of Interest thereon or upon some part thereof, doth not now remain and is not due and owing to the said Complainant from the said Testatrix's Estate, and as requires this Defendant to set forth a List and Schedule of all Books of Account, Accounts, Receipts, Vouchers, Deeds, Evidences, Papers and Writings of or concerning or relating to the hereinbefore mentioned matters and things, or any or either of them, or any parts or part thereof, which are, or at

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any time or times were in the possession or power of this Defendant, and *Thomas Dowding* and *Elizabeth Dowding*, two other Defendants to the said Bill of Complaint, or any or either and which of them, or any person or persons for or on account or on behalf of this Defendant, and the said two other Defendants, or any or either and which of them; and in such List or Schedule to particularize and distinguish which of the several Books of Account, Accounts, Receipts, Vouchers, Deeds, Evidences, Papers and Writings are now in the possession or power of this Defendant, and the said two other Defendants, or any or either and which of them, or any and what person or persons for or on the account or behalf of this Defendant, and the said two other Defendants, or any or either and which of them, and to account for the Residue of the said several Books of Account, Accounts, Receipts, Vouchers, Deeds, Evidences, Papers and Writings, and set forth what is become thereof, and where and in whose possession, and for whom, and for whose account and behalf the same respectively now are, and why, when, where and to whom and for what this Defendant and the said two other Defendants, or any or either and which of them, last parted therewith respectively, this Defendant doth plead in bar, and for Plea saith that the said *Martha Butt* was not, at the time of her death, indebted unto the said Complainant in the Sum of 215*l.* and upwards, or in any other sum of Money whatever. All which matters and things this Defendant doth aver to be true, and is ready to prove as this Honourable Court shall award; and he doth plead the same in bar to the whole of the said Bill, except such parts as aforesaid; and doth humbly demand the Judgment of this Honourable Court, whether this Defendant ought to be

1825.

TAMING

v.

EUGEN

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v.
EDGAR.

compelled to make any further or other Answer to such parts of the said Bill as he hath pleaded unto, and prays to be dismissed in respect thereof, with his Costs and Charges in this behalf sustained. And this Defendant not waiving the benefit of his said Plea, but wholly relying and insisting thereon, and in aid and support thereof, for Answer to the remainder of the said Complainant's Bill not hereinbefore pleaded unto, or unto so much thereof as this Defendant is advised it is in anywise material or necessary for him to make answer unto, answereth and saith that the said *Martha Butt* was not, in her lifetime or at the time of her death, to the knowledge or belief of this Defendant, indebted unto the said Complainant in the Sum of 215 *l.* and upwards, or any other Sum, for Goods sold and Money lent, paid, laid out and advanced by him to the said *Martha Butt* to and for her use, and by her order, and on her account, in her lifetime, or in or by any manner or means; and that this Defendant hath not, nor ever had, nor have, or hath, or ever had the said two other Defendants, *Thomas Dowding* and *Elizabeth Dowding*, or either of them, to the knowledge or belief of this Defendant, nor hath, or have, or ever had any Person or Persons for or on the account or behalf of this Defendant, or (to his knowledge or belief) of the said two other Defendants, or either of them, any Books of Account, Accounts, Receipts, Vouchers, Deeds, Evidences, Papers, or Writings, of or concerning or relating to the matters and things aforesaid, or any or either of them, or any parts or part thereof. And this Defendant denies all, and all manner of combination without this, that &c."

This Plea now came on to be argued.

Mr. *Lovatt*, for the Plea, insisted that it was not

enough that the Plea should deny that any Debt existed, but that it was necessary to accompany it by an Answer as to the particular manner in which the Bill alleged that the Debt was contracted; and that, inasmuch as the Bill charged that the Defendants were in possession of Books and Papers from which the truth of the Matters stated would appear (which included the Statement as to the Debt) it was necessary also to answer as to the fact, whether the Defendant had or not any such Books or Papers.

Mr. Knight, for the Bill.

The VICE-CHANCELLOR:—

In the Case of *Sanders v. King*, which came before me in May 1821, I had occasion very fully to consider the form and principle of pleading upon a negative Plea. It has happened that this Case has not been reported *. But I have a correct note of my Judgment, which embraces all the material facts of the Case, and I will now read it.

[Here the Vice-Chancellor read the Judgment in *Sanders v. King*, which was as follows]:—

“ THIS is a Bill for an account of the Dealings and Transactions of a Partnership, in which the Defendant *King* is alleged to have been concerned; and the Defendant *King* has, to the whole of the Discovery, pleaded that he was no Partner. 2d May 1821.

“ Upon this Plea the issue between the Parties is, whether a Partnership did or not exist; and the Plaintiff objects that, although the Defendant does by his

* It has since been discovered that this Case is reported 6 Madd. 61.

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THRING

v.

EDGAR.

Plea affirm, upon his Oath, that there was no Partnership, yet he is not thereby to deprive the Plaintiff of that right to a Discovery which the principles of a Court of Equity give to every Suitor as to the Matter in issue between the Parties; and that, notwithstanding his Plea, the Defendant is therefore bound to answer to all Facts and Circumstances which are stated in the Bill as affording Evidence to disprove the truth of the Plea.

“ It is very singular that this question does not appear ever to have distinctly arisen before.

“ In the case of *Drew v. Drew* (a), Sir Thomas Plumer decided, generally, that a Plea of no Partner was a good Plea; but the present point was not taken.

“ It is stated by Lord *Redesdale*, p. 244, in the last edition of his Treatise, as the result of several Authorities, that, if a Plea in bar be disproved at the hearing, the Plaintiff is not to lose the benefit of his Discovery; but the Court orders the Defendant to be examined upon Interrogatories to supply the defect.

“ This necessarily refers to Discovery as to the other Matters of the Suit, and not as to the truth of the Plea, which is already disposed of; but marks the care of the Court to maintain for the Plaintiff that advantage of Discovery which is the peculiar province of a Court of Equity.

“ The Discovery which a Court of Equity gives is, not the mere Oath of the Party to a general fact, as Partner-

(a) 2 V. & B. 159.

ship or no Partnership, but an Answer upon Oath to every collateral Circumstance charged as Evidence of the general Fact.

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“ Where the Defendant, therefore, pleads the general Fact as a bar to the whole Discovery as well as Relief, either the Plaintiff, in the particular case, must lose the equitable privilege of Discovery as to the circumstances which he has charged as evidence of the Fact, or some special rule must be adopted, by analogy, in order to preserve to him that Privilege.

“ If a Plaintiff comes into Equity to avoid a legal Bar, upon the ground of some alleged equitable circumstances, as in the case of a Release, the Defendant is not permitted to avail himself of his legal Defence, so as to exclude the Plaintiff from a Discovery as to the alleged equitable Circumstances. He may, indeed, plead his Release; but he must in his Plea generally deny the Equity charged in the Bill, and must also accompany his Plea with a distinct Answer and Discovery as to every equitable circumstance alleged.

“ In such a case the issue tendered by his Plea is, not the fact of his Release, for that fact is admitted by the Bill, but the issue is upon the equitable Matter charged. Yet, inasmuch as the principles of a Court of Equity entitle the Plaintiff to a Discovery from the Defendant upon the Matter in issue, here we find that, notwithstanding the Defendant pledges his Oath that there is no truth in the equitable Matter charged, he is nevertheless compelled to accompany his Plea by an Answer and Discovery as to every circumstance alleged as Evidence of the Equity

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" This practice seems to afford a very strong analogy for the present purpose. There the Defendant affirms upon his Oath that there is no equitable Matter to destroy the legal bar of the Release, yet he is nevertheless bound to accompany his Plea with an Answer and Discovery as to every circumstance charged as Evidence of that Equity. Here the Defendant affirms upon his Oath that there is no Partnership; and, by analogy, it seems to follow that he is nevertheless bound to accompany his Plea with an Answer and Discovery as to every Circumstance charged as Evidence of the Partnership.

" Adopting, therefore, this analogy for the present purpose, it furnishes this Rule, that a Plea which negatives the Plaintiff's Title, though it protects a Defendant generally from Answer and Discovery as to the subject of the Suit, does not protect him from Answer and Discovery as to such Matters as are specially charged as Evidence of the Plaintiff's Title.

" According to this Rule this Plea, not being accompanied by an Answer and Discovery as to the Circumstances specially charged as Evidence of the Partnership, must be over-ruled; but, being a new Case, the Defendant must be at liberty to amend his Plea."

To apply these Principles to the present Case. If the Testatrix were not at her Death indebted to the Plaintiff in any sum of Money, then the Plaintiff's title to any Relief, or any Discovery upon this Bill, wholly fails, and the Plea of no Debt is a full bar to the whole Suit; unless the Plaintiff has sought from the Defendant a discovery of any circumstances by which the existence

of the alleged Debt is to be established; and then the Defendant, although by his Plea he may deny the Debt, must still answer as to the particular Discovery which is thus sought from him. But, in order that a Defendant may in such a case know what is the particular Discovery which the Plaintiff requires from him, it is incumbent upon the Plaintiff distinctly to state it in the Bill; and the common form of doing this is, by the Plaintiff's charging, as evidence of his Title, the particular Matters as to which he seeks a discovery from the Defendant. Unless the Defendant is distinctly informed by the Plaintiff what are the particular matters affecting his Title, as to which he seeks such Discovery, the Defendant, not knowing what he is expected to answer, is not to answer at all.

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The Plaintiff in the present Bill gives no distinct information to the Defendant that he seeks any Discovery from him, for the purpose of establishing the existence of the Debt. The Defendant's Plea therefore of no Debt, was a full bar to the whole Discovery, as well as to the Relief; and the Defendant as much over-ruled his Plea by answering to the Debt, as he would have over-ruled it by answering to any other part of the Bill.

If, upon the filing of this Plea, the Plaintiff had desired a particular Discovery from the Defendant as to any circumstances by which the Debt was to be established, he would have amended his Bill, and would have charged, as evidence of his Title, the special Matters which he required to be answered.

Plea over-ruled (b).

(b) See the next case.

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15th April.

PENNINGTON v. BEECHEY.

Pleading.

In a Plea of Purchase for valuable Consideration without Notice, it is enough to deny Notice generally in the Plea; unless Facts are specially charged in the Bill as Evidence of Notice.

THE Bill was filed for a Discovery in aid of an Ejectment, which the Plaintiff had brought against the Defendant, to recover possession of an Estate. It alleged that the Plaintiff was entitled to the Estate under a Settlement, made upon the Marriage of his Great-grandfather in 1717; and that the Defendant had frequently admitted to the Plaintiff's Father that he held the Estate during the Life only of the Plaintiff's Father, and that at his Death the Plaintiff would succeed to it.

The Defendant pleaded a Conveyance of the Estate, made to him in 1795, by a Person then in the actual possession of it and who alleged himself to be seised in Fee, for 600*l.*; and averred that he had not, at or before the time of the execution of the Conveyance or the payment of the 600*l.*, any Notice whatsoever of any Right, Title or Interest of the Complainant in or to the Premises, or any part thereof.

The Plea now came on to be argued.

Mr. Temple, for the Plea.

Mr. J. Martin, for the Bill, objected that the Plea ought expressly to have denied Notice of the Settlement of 1717, under which the Plaintiff claimed; and that it ought to have been accompanied with an Answer as to the alleged admissions of the Plaintiff's Title, made by the Defendant to the Plaintiff's Father.

The VICE-CHANCELLOR:—

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The Plaintiff insists that Notice of the Settlement of 1717 would have been constructive Notice of the Plaintiff's Title: but it does not follow that the Plea therefore ought specially to have denied Notice of that Settlement. The general denial by the Plea of all Notice whatsoever, includes constructive as well as actual Notice, and is therefore a denial of Notice of the Settlement. It is not the office of a Plea to deny particular facts of Notice, even if such particular facts are charged. Here the Plaintiff, not anticipating, by the Bill, the defence of the Defendant as a Purchaser for a valuable Consideration, has not charged that the Defendant had Notice of this Settlement, or any Notice of his Title.

If the Plaintiff had meant to have affected the Defendant with Notice of this Settlement, he should have charged generally, in his Bill, that the Defendant had Notice of his Title; and then, as evidence thereof, should have specially charged Notice of the Settlement. In such case the Defendant, notwithstanding the general denial of Notice in the Plea, would have been bound to answer as to the special Notice of the Settlement.

With respect to the objection, that the Plea ought to have been accompanied with an Answer as to the admission of the Plaintiff's Title, alleged to have been made by the Defendant, because such admissions would have been evidence that the Defendant had Notice of the Plaintiff's Title, the Answer is that the Plaintiff has not made that Case in his Bill. For such a purpose also the Plaintiff, after generally charging that the Defendant had Notice of his Title, should, as evidence thereof, have

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specially charged these admissions, which the Defendant would then have been bound to answer, notwithstanding the general denial of Notice in the Plea.

Plea allowed (a).

(a) See preceding case.

18th April.

LOGAN v. FAIRLIE.

*Legacy-duty.
Administration.
Parties.*

A Testator resident in India, and having all his Property there, bequeathed his Residuary Estate to *H. L.* but if she should die before him, then to her Children. *H. L.* died before the Testator, and the Executor, who was also resident in India, proved the Will there, and remitted the Residue to his

JOHN HOME, a Major in the service of the *East India Company*, bequeathed the Residue of his Estate and Effects, both Real and Personal, to his Brother, the Defendant, *James Home*, of *Broom House*, in the County of *Berwick-upon-Tweed*, and his Sister, *Helen Logan*, of *Tweed Hall*, in the same County, in equal Shares, if they should be living at his Decease; but, in case his Sister should die before him, leaving Children, he desired that her Children should have the Share that she would have been entitled to if living, Share and Share alike: and he appointed the Defendants, *Fairlie* and *Clark*, both of whom were resident in *India*, Executors of his Will.

The Testator died in *India*, leaving no Property in *Great Britain*; and *Clark* proved his Will in *Calcutta*. *James Home* survived the Testator; but Mrs. *Logan* died in his Lifetime, leaving nine infant Children surviving Agent in England, with directions to pay it to *H. L.* or her children. A suit having been instituted by the Children, who were Infants, against the Executor and his Agents to have the Residue secured: Held that the Legacy-duty was payable upon it, and that Administration to the Testator ought to have been taken out in this Country, and the Administrator made a party to the Suit.

her. In 1819, *Clark* remitted 7,000 *l.*, part of the Testator's Residuary Estate, to *Fairlie, Bonham & Co.* his Agents in this Country, with directions to pay one Moiety of it to *J. Home*, and the other, to *Mrs. Logan*, or her Children. *Fairlie, Bonham & Co.* without making any deduction for Legacy-duty, paid over one Moiety of the 7,000 *l.* to *James Home*, the Testator's Brother, but refused to part with the other Moiety; upon which this Suit was instituted by *Mrs. Logan's* children, against *Fairlie, Bonham & Co.* and also against *Clark* and *James Home* (both of whom were charged to be out of the Jurisdiction of the Court) for the purpose of having that Moiety secured for the benefit of the Plaintiffs. Under an Order in the Cause, the Moiety in question had been paid into Court, and invested in Stock. By the Decree inquiries were directed to ascertain whether *Mrs. Logan* was dead, and what Children she left at her Decease; and liberty was given to *Fairlie, Bonham & Co.* to apply to the Court in case they should be drawn upon from *India* for the Moiety.

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By the Decree on further directions, the Stock was carried over, in Ninths, to the separate Accounts of the Plaintiffs. The eldest of them, on coming of Age, had obtained an Order for Payment of his Share: but the Accountant-General declined to comply with the Order unless a Receipt for the Legacy-duty was produced to him. The Duty was accordingly paid, but upon an understanding that it should be refunded in case the Court should be opinion that it did not attach. Another of the Plaintiffs having come of Age, petitioned for a Transfer of her Share (a).

(a) The above Statement is taken from the Petition. It

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On the hearing of this Petition the only question ~~was~~, whether the Duty was payable upon this Share?

Mr. *Pemberton*, for the Petitioner :—

The Legacy-duty is not payable, unless there is a Personal Representative of the deceased in *England*; and the mere remitting of the Fund to *England* does not make it liable to the Duty. The Stamp-office admits that the Duty does not attach when a Power of Attorney to receive a Legacy is sent Abroad; but that it does, if the Legacy is remitted to this Country; so that an Infant entitled to a Legacy must pay the Duty, when an Adult would not, because the latter could execute a Power of Attorney, and the former could not. It is plainly contrary to Reason and Justice that this should be the case, and, therefore, it is impossible that the Legislature should have intended it. The 36 Geo. 3, c. 52, first repeals the Duties imposed by former Acts, and then imposes new Duties; and directs that such new Duties shall be under the Care, Management and Direction of the Commissioners for the time being appointed to manage the Duties on Stamped Vellum, Parchment and Paper^(b). This shows that the Act relates only to Funds in *England*. It is clear, from

appeared, however, by the Answer, that, when *Clark* remitted the 7,000 *l.* to his Agents, he sent them a Copy of the Residuary Clause of the Will, and desired them to appropriate the Fund accordingly, adding that they would perceive, by the Clause, that half of the Fund went to *J. Home*, and half to *Mrs. Logan*, or her children.

(b) See Sections 1, 2, & 3.

the sixth Section (c), that the Person who is to pay is the Executor or Administrator. This Clause applies only to an Executor proving a Will in *England*; for

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(c) This Section is as follows:—" And be it further Enacted, That the Duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid, by the Person or Persons having or taking the burthen of the Execution of the Will or other Testamentary Instrument, or the Administration of the Personal Estate of any Person deceased, upon retainer for his, her, or their own Benefit, or for the Benefit of any other Person or Persons, of any Legacy, or any part of any Legacy, or of the residue of any Personal Estate, or any part of such Residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other Person or Persons; and also upon Delivery, Payment, or other Satisfaction or Discharge whatsoever of any Legacy, or any part of any Legacy, or of the residue of any Personal Estate, or any part of such Residue, to which any other Person or Persons shall be entitled; and in case any Person or Persons having or taking the burthen of such Execution or Administration as aforesaid, shall retain for his, her, or their own Benefit, or for the Benefit of any other Person or Persons, any Legacy, or any part of any Legacy, or the residue of any Personal Estate, or any part of such Residue, which such Person or Persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other Person or Persons, and upon which any Duty shall be chargeable by virtue of this Act, not having first paid such Duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any Legacy, or any part of any Legacy, or the residue of any Personal Estate, or any part thereof, to which any other Person or Persons shall be entitled, and upon which any Duty shall be chargeable by virtue of this Act, having received or deducted the Duty so chargeable, then and in

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it would be absurd that the Representative of a Person dying in a Foreign Country, and leaving Property there only, should be compelled to pay a Duty in *England*. It is clear that the Duty does not attach where the Legacy is only paid in *England*.

The 48 Geo. 3, c. 149. sect. 44, enables the Commissioners to stamp a Receipt for a Legacy which has been signed out of *Great Britain*. So that, if the Crown is right in contending that the Duty is payable notwithstanding the Property is administered Abroad, and as by this section it is due where the Legacy is paid Abroad, it follows that, if the Executor comes to *England* he is not only liable to pay the Duty, but to all

every of such Cases, the Duty which shall be due and payable upon every such Legacy, and part of Legacy and Residue, and part of Residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his Heirs and Successors, according to the Provisions of this Act, shall be a Debt of such Person or Persons having or taking the burthen of such Execution or Administration as aforesaid, to his Majesty, his Heirs and Successors; and in case any such Person or Persons so having or taking the burthen of such Execution or Administration aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such Legacy or Residue, or any part of any such Legacy or Residue, to or for the benefit of any Person or Persons entitled thereto, without having received or deducted the Duty chargeable thereon, (such Duty not having been first duly paid to his Majesty, his Heirs or Successors, according to the Provisions herein contained,) then and in every such Case such Duty shall be a Debt to his Majesty, his Heirs and Successors, both of the Person or Persons who shall make such Delivery, Payment, Satisfaction, or Discharge, and of the Person or Persons to whom the same shall be made."

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the Penalties imposed by the Acts of Parliament relating to the payment of Legacies. It is impossible that the Legislature could have intended this.

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The Cases which have been decided upon this subject, are Authorities to show that the Duty is not payable in this instance. In *The Attorney-General v. Cockerell* (d), the Counsel for the Crown put their Claim upon a ground which clearly shows that the Duty is not payable in this Case; and the Decision was founded on the circumstances of the Will being proved in this Country, and the Money in the hands of the Executor being Assets for payment of Debts in this Country. The only other Case is, *The Attorney-General v. Beatson* (e), in which there was the same Decision on the same ground. In both these Cases the Will was proved in *England*, a circumstance which is wanting here. This Property was not administered in *England*; nor was it Assets in *England*. There can be no doubt that the Payment into Court under the Decree, was Payment to the Legatees. *Hill v. Atkinson* (f). This Money was remitted by the Executor to his Agents, and was therefore liable to be recalled; and there is a Provision in the Decree, that the Agents may apply to the Court to have it repaid; now can it be contended that it was intended to subject the Legacy to the Duty by adopting the Payment?

Mr. Wakefield, for the Defendant Fairlie and his Partners:—

The rule by which the question in this Case must be

(d) 1 Pri. 165. (f) 3 Pri. 399.

(e) 7 Pri. 560.

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decided is, that if the **Executor** acts under the **Authority** of a Court in this Country the Duty does attach; if he does not, the Duty does not attach.

Mr. Boteler, for the Crown :—

This Case does not differ from *The Attorney-General v. Cockerell*. It has been taken for granted that there was no Administration of the Property in this Country; but there was an act of Administration in this Country. If this Suit is rightly framed, it is clear that the Crown cannot have any claim to the Duty. But the question is, whether this Suit is rightly framed, and whether Administration ought not, regularly, to have been taken out in this Country before this Suit was instituted.

Mr. Pemberton, in reply :—

Here the Property was not administered in *England*, but was remitted for the Payment of a particular Legacy. It was appropriated in *India* to the Payment of a Legacy in *England*, which is the same as if the Legacy had been actually paid in *India*.

The VICE-CHANCELLOR :—

This question, strictly speaking, is not cognizable by this Court. The Court of Exchequer alone has jurisdiction to decide it: and, if my opinion was unfavourable to the claim of the Crown, I should give the Attorney-General the opportunity of taking the Judgment of the Court of Exchequer upon it. For the same reason I now propose to the Petitioner, if he is dissatisfied with my Opinion that the Legacy-duty is payable, to put this matter in such a course that he may ob-

tain the Judgment of the Court of Exchequer upon the point.

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Where a Testator dies in India, leaving Personal Estate there only, and his Executors reside and prove his Will there, no Duty is payable on a Legacy remitted to a Legatee in England.

If a Testator die in *India*, and his Personal Estate be wholly in *India*, and his Executor be resident there, and the Will be proved there, and the Executor remit to a Legatee in *England*, or to some other Person in *England*, for the specific use of the Legatee, the amount of his Legacy, I am of opinion that the Legacy-duty is not payable upon such Remittance, inasmuch as the whole Estate is administered in *India*, and the Remittance is in respect of a demand which is to be considered as established there. But if a part of the Assets of the Testator is found in *England*, in the hands of the Agent of such Executor, without any specific appropriation, and a Legatee in *England* institute a Suit here for the payment of his Legacy out of such unappropriated Assets] then such Assets are to be considered as administered in *England*, and the Legacy-duty is payable in respect of them. Now that is the case here. The Sum in question was remitted by the Executor in *India* to the Defendants, for the purpose of being paid to *Helen Logan*, the residuary Legatee; and, if *Helen Logan* had been the residuary Legatee, and the Payment had been made to her accordingly, the Legacy-duty would not, upon my principle, have been payable here. But *Helen Logan* had died in the lifetime of the Testator, and the Gift of the Residue to her had lapsed, and her Children, the Plaintiffs, were the residuary Legatees; and their Bill was filed, not upon the ground of a specific appropriation of this Sum to them by the Executor, for no such appropriation had been made, but upon the ground of their title under the Will as residuary Legatees, and because the Sum in question was admitted to be part of the Testator's

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residuary Estate. This Sum, therefore, was Estate of the Testator administered here, and the Legacy-duty is, for that reason, payable.

It must be observed, however, that this Suit has proceeded irregularly. This Court cannot administer any Personal Estate without having the Personal Representative before it; and this Suit is defective throughout for want of such Personal Representative, though the objection occurs now too late to be corrected.

22d April.

Lien.
Bankrupt.
Set-off.

NELSON v. THE LONDON ASSURANCE
COMPANY.

The Directors of a Company assigned their Salaries and Shares to the Company to secure Debts due from them on their private Accounts, and empowered the Company to direct the Treasurer to

retain their Salaries and Dividends, and sell their Shares, for payment of their Debts. One of the Directors became Bankrupt, but the Power given to the Company had not been exercised, and his Shares still remained in his Name: Held that they passed to his Assignees as being in his order and disposition, but that the Company had a right to set off, against the Bankrupt's Debt, the Dividends and Salary due to him at his Bankruptcy.

ANDREW TIMBRELL having purchased Eighty Shares in the Capital of *The London Assurance Corporation*, they were transferred into his Name, and assigned to him in the manner prescribed by the Charter, and he was elected a Director of the Body.

A Deed, bearing date the 8th of July 1819, was made between the Corporation of the one part, and the Governor, Sub-Governor, Deputy-Governor and Directors of the other part; whereby, after reciting that the Governor,

Sub-Governor, Deputy-Governor and Directors, being Merchants, transacted business with the Corporation in their separate and private capacities, and that it was usual for the Corporation to give credit to Persons who transacted business with them; and, lest it might be doubtful whether the Stock of the Governors and Directors, to each of them separately belonging, were liable to the Payment of the Debts which might be owing to the Corporation from them, respectively, or jointly, in their private and separate capacities, for obviating such doubts, and for better securing to the Corporation all such sums of Money as the Governors and Directors, or any of them, in their private capacities, either alone or jointly with any other Person or Persons, did or might, at any time during their continuance in the Direction, owe or stand indebted to the Corporation, the Governor, Sub-Governor, Deputy-Governor and Directors **did** separately covenant and agree with the Corporation, that the Salary of each of them, and also their and each of their Stock, Share, and Interest in the Capital Stock of the Corporation, and all Dividends due and to grow due thereon, should be subject and liable to the Payment of all such sums of Money: and a Committee of Treasury for the time being of the Corporation were thereby authorized and empowered to stop and retain the respective Salaries and Dividends in the respective Stock of such Governor, Sub-Governor, Deputy-Governor and Directors for those purposes, and to sell and dispose of such Stock, or so much thereof as should be necessary, when and as the Court of Directors should think fit, and to apply the said Salary and Dividends, and the Money arising from such Sales, towards satisfaction and payment of such Debts and sums of Money, rendering the overplus (if any) to the Proprietors of such

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Stock or Shares: And the Parties thereto of the second part appointed the Accountant of the Corporation their Attorney for the purposes of such Sales as should be authorized and directed by any Order or Resolution of the Court of Directors, and to receive the Money arising thereby, and to apply the same in the manner thereby directed and agreed: And, further, it was thereby agreed that, until there should be some Order or Resolution of the Court of Directors to the contrary, it should be lawful for each of those Persons to receive their respective Salaries, and the Dividends upon their Stock or Shares, and to sell and transfer their Stock and Shares.

In February 1821, a Commission of Bankrupt issued against *Timbrell*; and the Plaintiffs were appointed his Assignees. At the time of the Bankruptcy, *Timbrell* was indebted to the Corporation in 852 l. on a Bond for securing Premiums on certain Insurances effected with the Corporation. It did not appear that there had been any Order made by the Court of Directors for stopping *Timbrell's* Salary, or the Dividends on his Shares, or for selling those Shares.

The Plaintiffs insisted that they were entitled to be paid the arrears of Salary and Dividends due to the Bankrupt, and to have his Shares of the Capital transferred to them, as being in his order and disposition at the time of his Bankruptcy. The Corporation claimed, under the Deed of July 1819, a lien upon those Arrears and Shares in respect of the Debt of 852 l.

Mr. *Horne* and Mr. *Rose* for the Plaintiffs.

Mr. *Heald*, Mr. *Roupell* and Mr. *Polson*, for the Defendants.

The VICE-CHANCELLOR:—

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The Clause at the end of the Deed of the 8th of July 1819, expressly provides that, until there shall be some Order of the Court of Directors to the contrary, it shall be lawful for every Director to receive his Salary and Dividends, and to sell and transfer his Stock and Shares. Previous to the Bankruptcy of *A. Timbrell* there had been no such Order of the Court of Directors, and, at the time of his Bankruptcy, therefore, such Stock and Shares were in his Order and Disposition, and passed under the Commission to his Assignees. In respect of the Monies which were due at the Bankruptcy for Dividends and Salary, the Corporation have a right of Set-off; and the Decree must be for transfer of the Shares only, and for Dividends subsequent to the Bankruptcy.

MASON v. ROBINSON.

1825.

25 April.

Will.

Construction.

JOHN DIXON, after devising his Real Estate to Trustees, their Heirs and Assigns, proceeded as follows: Upon Trust to pay unto *Ann*, the Widow of my Son *Ralph Dixon*, one Annuity or clear yearly Sum of 10 l. till her Death or second Marriage, which shall first happen, the said Annuity to be payable half-yearly at *Michaelmas* and *Ladyday*, the first Payment thereof to begin and be made at such of those Days as shall happen

To avoid a Will for uncertainty, it is not enough that the Dispositions in it are so absurd and irrational that it is difficult to believe they

could have been intended by the Testator; but it must be incapable of any clear meaning.

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next after my Decease, clear of all Land-tax and other Outgoings; and, subject as aforesaid, upon Trust to pay and apply the remainder of such Rents and Profits from time to time as they shall yearly accrue and be received, and all such Rents and Profits from the Death or second Marriage of the said *A. Dixon*, which shall first happen, for and towards the Maintenance and Education of my Grandson *John Dixon*, Son of the said *Ralph Dixon*, until he shall attain his Age of Twenty-one Years; but in case he shall die before he attains that Age, then, from his Death, to pay and apply such Rents and Profits (or the whole thereof from the Death or second Marriage of the said *A. Dixon* as aforesaid) for and towards the Maintenance and Education of my Grand-daughter *Margaret Faith Dixon*, the Daughter of the said *R. Dixon*, deceased, until she shall attain her Age of Twenty-one Years; and my Will is, that the Receipt of the Person or Persons who shall have for the time being the care of the persons of my said Grandchildren respectively, shall be a sufficient discharge to my Trustees for the Money so paid; and from and after my said Grandson *J. Dixon* shall have attained his Age of Twenty-one Years, or my said Grand-daughter *M. F. Dixon* (surviving him as aforesaid) shall have attained her said Age of Twenty-one Years, then upon Trust that my said Trustees, the Survivor or Survivors of them, or the Heirs and Assigns of such Survivor, shall and do, out of the Rents and Profits of the Premises hereby devised to them, pay unto my Son, *W. M. Dixon*, an Annuity or clear yearly Sum of 20 *l.* during the term of his natural Life, payable half-yearly, and Tax free, at *Michaelmas* and *Ladyday*; the first Payment thereof to begin and be made at such of those Days as shall first happen next after my said Grandson, *J. Dixon*, shall have attained his Age of

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Twenty-one Years, or next after my said Grand-daughter *M. F. Dixon* (surviving her said Brother as aforesaid) shall have attained her said Age of Twenty-one Years; and, subject thereto, upon Trust to pay and apply the remainder of such Rents and Profits unto the said *Ann Dixon* yearly during the natural Life of the said *William Dixon*, or until her second Marriage, which shall first happen; and, from and after the death of my said Son *William*, then upon Trust that my said Trustees, and the Survivor or Survivors of them, and the Heirs and Assigns of such Survivor, shall and do convey and assure all and every the said Messuages, Lands, Hereditaments and Premises (subject and charged as aforesaid) unto and to the use of my said Grandson *John Dixon*, and the Heirs of his Body lawfully to be begotten; but if my said Grandson *John Dixon* shall happen to die before the period aforesaid, without leaving lawful Issue living at his Death, then upon this further Trust that my said Trustees, or the Survivors or Survivor of them, or his or her Heirs or Assigns, shall and do pay the Rents and Profits of the said Premises unto my said Son *William Dixon* for and during the term of his natural Life, first deducting thereout the said Annuity of 10*l.* for the said *Ann Dixon*, in case she shall then remain the Widow of the said *Ralph Dixon*; and, from and after the death of the said *William Dixon*, then upon Trust to convey the same, subject and charged as aforesaid, to and amongst all and every the Child or Children of the said *William Dixon* lawfully to be begotten, Share and Share alike, as Tenants in Common, and not as Joint Tenants; and, in default of such Issue, upon Trust to convey the same and every part thereof, subject as aforesaid, unto and to the use of the said *Ann Dixon*, her Heirs and Assigns for ever."

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The Testator died in 1785. *Ann Dixon* died in 1792. *J. Dixon*, the Grandson, died in 1803, having long before attained his Age of Twenty-one Years. *William Dixon*, the Son of the Testator, died in 1820, and the Children of *William Dixon*, at the time of filing the Bill, were in the actual Possession of the Property. The only question in the Cause was, whether, in the events which had happened, the Children of *William Dixon* were well entitled to the Estate according to the true construction of the Will, or who otherwise was entitled thereto according to such construction, or whether the Will was void for uncertainty.

Mr. *Heald*, and Mr. *Wilson*, for the Plaintiffs.

Mr. *Hart*, Mr. *Willis*, and Mr. *Rolfe*, for the Defendants.

The VICE-CHANCELLOR:—

It is not enough to avoid a Will for uncertainty that the Dispositions, which are plainly expressed, are so absurd and irrational that it is difficult to believe that they should have been the real intention of the Testator. In order to avoid a Will for uncertainty, it must be incapable of any clear meaning. It is difficult to believe that this Testator, having given an Annuity of 10 l. to his Daughter-in-law, *A. Dixon*, for her Life or Widowhood, and having given the residue of the Rents and Profits for the maintenance of his Grandson, *J. Dixon*, until he attained Twenty-one, could really have intended that, when *J. Dixon* attained Twenty-one, his present Interest should wholly cease, and *A. Dixon* should then take, not her Annuity, but the whole Rents and Profits, and not for her Life or Widowhood, but during the life of the Testator's Son *William* or her Widowhood, and

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that the Rents and Profits should not return to *John* until the death of *William*, no Provision being made of the Rents and Profits in case of *Ann*'s second Marriage. But these Dispositions, however irrational and inconsistent with the general purposes of the Will, are clearly expressed, and must prevail if there is no other objection. The Testator, after giving the whole Rents and Profits to *Ann Dixon* during the life of the Testator's Son *William* or her Widowhood, then directs that, after the death of *William*, the Trustees are to convey the Estate to *John Dixon* and the Heirs of his body; but if *John Dixon* should happen to die before the period assigned, without leaving Issue at his death, then upon Trust to pay the Rents and Profits to the Testator's Son *William* during his Life, deducting thereout the Annuity of 10*l.* for *A. Dixon* in case she should not have contracted a second Marriage; and, after the death of *William*, then to convey the Estate, subject to *Ann*'s Annuity, to and amongst the Children of *William* as Tenants in Common. Here it is impossible to find any clear meaning. After the death of *William*, the Trustees are to convey to *John* and the Heirs of his body; but if *John* be then dead without Issue, then the Trustees are to pay the Rents to *William* for his Life, that is, after the death of *William* they are to pay the Rents to *William* so long as he shall live, and *Ann* also during the life of *William* is to receive the whole Rent, that is to say so long as *William* shall live; after his death to receive, not the whole Rents, but her original Annuity of 10*l.* only. There was plainly some error or omission in copying this Will from the rough Draft, and, it being impossible to assign any clear meaning to the Expressions which are now found in it, the Will is void for uncertainty.

The *Vice-Chancellor* afterwards allowed the Parties to take a Case for the Opinion of a Court of Law upon the Construction of the Will.

1825.
26th April.

SCOTT v. LIVESEY.

Practice.

Where Exceptions will lie to a Master's Report, it must be regularly confirmed before any Order can be made upon it.

THIS was a Petition by a Purchaser under a Decree of the Court, stating an Order, by which it was referred to the *Master* to inquire whether the Plaintiff could make a good Title to the Premises in question; that the *Master*, by his Report, had certified that the Plaintiff could make a good title to the Premises in question, and praying that the *Master's* Report might be confirmed, and an Order made for completing the Purchase conformably thereto.

Mr. *Spence*, for the Plaintiffs, objected that the *Master's* Report had not been regularly confirmed, and that therefore no Order could be made upon the Petition.

The *Vice-Chancellor* allowed the Objection, stating that wherever, as here, Exceptions would lie to the *Master's* Report, it must be regularly confirmed before any Order could be made upon it.

MONEY v. MACLEOD.

1825.
28th April.

Account.
Public Policy.

THIS was a Bill filed against Captain *Macleod*, and on his death revived against his Executors, for an account of the Profits of two Voyages to *India* made by Captain *Macleod* in the *East-India Company's* Ship called *The Walthamstow*.

Where the Plaintiff filed his Bill for an account of the Captain's Profits of a Voyage to *India* in one of the Company's Ships, to a Share of which the Plaintiff was entitled under an Agreement with the Captain, and it was alleged by the Captain's Executors that the Agreement was made in consideration of the Plaintiff having procured for the Captain the command of the Ship, this Court directed an Issue to ascertain the consideration, reserving the Question, whether such an Agreement would or not be void.

Captain *Macleod* having been appointed Captain of this Ship; and Mr. *John Hotson* having been appointed the Purser, the following written agreement was entered into between them and the Plaintiff, bearing date the 1st February 1804.

"We, the undersigned, being about to perform a Voyage to *India* in *The Walthamstow*, do severally and separately bind ourselves to one another, by an obligation of Honour, to engage in one united Concern for all the Expenses and Advantages attendant thereupon, and resulting from Trade, Purserage and Passengers; and do agree that our Proportions shall be as follows, viz. *W. T. Money* two-thirds, *D. Macleod* and *J. Hotson* one-third between them, equally to be divided. It is further understood that *W. T. Money* shall take out all or any part of his Family in the said Ship free of all Charge whatsoever; and it is agreed that a due proportion of Cash shall be provided, and that for any Surplusage over such Proportion the Party advancing it shall receive seven and a half per cent. from the Concern; and it is further agreed, that, if any difference of Opinion should arise, the Majority shall decide, and from their Decision there shall be

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no appeal to any Court of Law ; but, in the event of Death to one of the Parties, should there arise a Misunderstanding between the remaining two, such Misunderstanding shall be finally settled by Arbitration in the usual manner ; and, finally, the Parties concerned pledge themselves to keep this Engagement secret.

W. T. Money,
D. Macleod,
J. Hotson."

In pursuance of this Agreement the Plaintiff, with his Family, sailed to *India* in *The Walthamstow*. Various Sums to a considerable amount were advanced by the Plaintiff under this Agreement, and various pecuniary Transactions took place between the Plaintiff and Captain *Macleod* upon the footing of this Agreement, but the Account had not been finally settled.

On the second Voyage made by Captain *Macleod* to *India* in *The Walthamstow*, another Agreement, nearly in the same terms, was entered into between the Plaintiff and Captain *Macleod* and Mr. *Hotson* ; and various pecuniary Transactions had taken place between the Plaintiff and Captain *Macleod* upon the footing of this second Agreement, but without any final Settlement.

Captain *Macleod*, in his Answer to the original Bill, did not state any motive for entering into the first Agreement ; but he stated that he entered into the second Agreement at the request of Sir *Robert Wigram*, who was the principal Owner of the Ship, and had materially contributed to his appointment as Captain.

The Executors of Captain *Macleod*, in their Answer to the Bill of Revivor, stated that the Plaintiff had procured the command of *The Walthamstow* for Captain *Macleod*, upon an Engagement on the part of Captain *Macleod* that the Plaintiff should share in the Profits of the Appointment according to the Stipulations of the two written Agreements, and they insisted that such Agreements were therefore illegal and void, and that the Plaintiff, being himself an Officer in the Service of the *East-India Company* (Superintendent of Marine at *Bombay*) was, by Covenant and by the Bye-laws of the *East-India Company*, restricted from trading, and that the Agreements were, therefore, also void, and against public Policy.

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Sir *R. Wigram*, who was examined by the Plaintiff as a Witness, stated that Captain *Macleod* was named to the command of *The Walthamstow* chiefly on account of the respect he Sir *R. Wigram* had for him, and in consequence of the good opinion entertained of his conduct; and that the Plaintiff did not exert any influence with him Sir *R. Wigram*, or, as he knew or believed, with any other Person, otherwise than in common with other Persons speaking very highly of the conduct and abilities of Captain *Macleod*; and that, to his knowledge or belief, the Plaintiff did not have, take or receive any Gratuity, Consideration, Benefit or Advantage from Captain *Macleod*, or any other Person, in consequence of having exerted any influence to procure for him the command of the Ship.

The Cause now came on to be heard.

Mr. *Hart*, and Mr. *R. Grant*, for the Plaintiff.

The influence of the Plaintiff in procuring the appointment for Mr. *Macleod* could not be the consideration

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MACLEOD.

for the Agreement, because the Appointment required the sanction of the *East-India Company*; and the sanction of the Appointment by the Company always recites the recommendation by some individual of the Person appointed to the command of a Ship.

If the Agreements be illegal, they must be so, either, 1st, by the Bye-Laws of the *East-India Company*; or, 2d, by the Statute Law; or, 3d, by the Common Law.

I. The words of the Bye-Law applying to the Sale of the command of Ships in the *East-India Company's Service*, in operation at the time of these Agreements, have no application to this Case. That Bye-Law is expressly confined to the Case of the Directors of the Company, and none of the Parties were Directors at the time the Agreements were made. But even if the Bye-Law extended to Persons not Directors, it expressly refers to Officers of the Company in *Europe*; and the Office held by the Plaintiff was that of Superintendant of the Marine at *Bombay*. In *Richardson v. Mellish* (a), it was decided that an Agreement to resign the command of an *East-India Ship* in favour of an Individual under a pecuniary Penalty, was not an infringement of the Bye-Law. These subjects are clearly such as do not bind Parties in the situation of those in question.

II. As to the Statute Law, the only Statute applicable is the 5 & 6 Ed. VI. c. 16. But that Statute cannot affect this question, 1st, because it does not apply to Offices under the *East-India Company*; and, 2dly, because it does not relate to the brokerage of Offices,

(a) 2 Bing. 229.

but only to actual buying and selling of Offices. The Statute 49 Geo. III. c. 156, s. 1, which extends to Offices under the *East-India Company*, was not passed at the time when these Agreements were made, and therefore cannot affect them.

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III. As to the objection that the Agreement is illegal, because it is contrary to public Policy that such a situation as the Captain of an *East-India* Ship should be matter of Bargain; there are two grounds on which the supposed Impolicy is put. The first of these is from the nature of the *East-India Company*. Lord *Kenyon's dictum* in *Blachford v. Preston* (a), that the *East-India Company* is a Limb of the Government of the Country is relied on; and it is said that, being a Limb of the Government, the Laws which relate to the public Offices of the Government of the Country apply to the Officers of the *East-India Company*. But in *Richardson v. Mellish* (b), Mr. Justice *Burrough* distinctly states that the situation of Captain of an *India* Ship is not a public Office, but a mere Employment in the service of the *East-India Company* in their situation of a trading Company, and not as a Territorial Company. The principle of public Policy therefore, if it has any reference at all to such a Case, can only apply to the Territorial Officers of the *East-India Company*; and Lord *Kenyon's dictum* does not apply to an Officer who serves that Company in their character of Traders. The Expression of Lord *Kenyon*, in *Blachford v. Preston*, is a mere *dictum*, and was not at all necessary for the decision of the Case; and Chief Justice *Best*, in *Richardson v. Mellish*, refers to it, and distinguishes the manner in which that

(a) 8 T. R. 93.

(b) 2 Bing. 253.

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Case was put by Mr. Justice *Lawrence* and Lord *Kenyon*. Secondly, on general grounds it is difficult to comprehend on what principle of public Policy the doctrine of brokerage of Offices can extend to Transactions between private Individuals. If it be applicable to such a Case as this, it must also apply to Employments in every Navigation in which the Public are concerned. Nor would it stop there. It must on the same ground extend to Employments in Stage Coaches, and every species of public Conveyance. It must also take in all the links of Recommendation; not only that of the Person who recommends to the immediate Patron of the Offices, but also of all the Persons, in the most remote degree, through whom Recommendations have been given. If the doctrine were admitted in its application to such Cases, there could be nothing more injurious to the Trade which it is intended to protect. But it has been decided that brokerage of Offices, in a secondary degree, is not within the principle, unless there be a case of Oppression. *Purdy v. Stacey* (c).

The Cases in which the Sale of the Command of *East-India Company's* Ships have not been sanctioned have proceeded on different grounds, as in *The East-India Company v. Neave* (d); *Thomson v. Thomson* (e); *Card v. Hope* (f).

IV. Even if the Agreements were illegal as against the *East-India Company*, that is not conclusive against an Account as between the Parties. *Osborne v. Williams* (g). The whole of the Defendant's Case consists in setting up the illegality of the Agreement. But the

(c) 5 Burr. 2698. (d) 5 Ves. 173. (e) 7 Ves. 470.

(f) 2 Barn. & Cress. 661.

(g) 18 Ves. 379.

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Agreement itself is onerous, and it appears on the Answer that the Plaintiff advanced above 1,000*l.* on the footing of its being a valid Agreement. That is enough to give a right to an Account.

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V. The two Adventures, of which an Account is sought by the Bill, sprang from two separate Agreements; and, even if the first Agreement should be held objectionable, the second must be taken on the grounds on which it is put by the Answer of Mr. *Macleod*, and is then entirely unobjectionable. At least as to the second Agreement, therefore, there is a clear title to an Account.

Mr. *Horne*, and Mr. *Purvis*, for the Defendants, the Executors, insisted on the illegality of the Agreements, and relied on *Blachford v. Preston*, and *Hanington v. Duchastel (h)*.

Mr. *Sidebottom* appeared for the Assignees of *Hotson*, who had become a Bankrupt.

The *Vice-Chancellor* observed that, as to the second Agreement, Captain *Macleod* having stated in his Answer that he had entered into it at the request and out of gratitude to Sir *Robert Wigram*, it was not open to the Court to impute to him any other motive with respect to it, and that the Plaintiff was therefore entitled to an account of the second Voyage: That, not being fettered by Captain *Macleod*'s Answer with respect to the first Voyage, it did appear to *His Honor* that the Agreement of the 1st of February 1804 afforded intrinsic

(A) 1 Bro. C. C. 125. More correctly reported 2 Swan. 159.

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evidence of an Engagement between the Plaintiff and Captain *Macleod* to the effect alleged in the Answer of the Defendants, the Executors; it being wholly irrational to suppose that Captain *Macleod* would give to the Plaintiff much the greater share of the Profit of his Command without some powerful inducement; and no other inducement being suggested by the Plaintiff except the assistance as to the advance of Money, which it was said, he might derive from his connexion with the Plaintiff, but which was not stipulated for in the Agreement, and could be no adequate inducement; and that the obligation of Honour and the condition of Secrecy, which were to be found in the Agreement, were clear evidence that, in the opinion of the Parties, the Transaction was not of a nature which would bear the light.

The *Vice-Chancellor* directed an Issue to be tried at Law as to the first Agreement, in the following terms :

“ Whether the Agreement of the 1st of February 1804, in the Pleadings mentioned, was entered into by the late Defendant, *Donald Macleod*, either wholly or partly in consideration of Assistance rendered or supposed to be rendered by the Plaintiff to the said late Defendant, in procuring for the said late Defendant the command of the Ship *Walthamstow* in the said Agreement named.”

TYLER v. DRAYTON.

1825.
2d May.

THE object of the Bill was to set aside a Sale and Conveyance of certain Estates made by *Griffith Jenkins*, deceased, the Plaintiff's Nephew, to the Defendant, as having been obtained for an inadequate consideration by taking advantage of the inexperience, imbecility of mind, and embarrassed circumstances of the Vendor. The Bill alleged that the Plaintiff, on her Nephew's decease, became entitled to these Estates under the Settlement on the Marriage of her late Father and Mother, and charged that the Defendant was in possession of that Settlement, and of other Deeds and Documents relating to the Estates, and to the Sale and Conveyance to him, and required him to set forth a Schedule thereof. The Answer denied all the Allegations of Fraud in the Bill. The Schedule annexed to it, set forth, as required by the Bill, a List of the Title-deeds, the Settlement, and the Defendant's Purchase-deeds.

Practice.
Production of Deeds.

If a Bill is filed to set aside a Conveyance on the ground of Fraud, the Court will not on Motion, order a production of the Conveyance.

The Plaintiff now moved for the production of all the Deeds mentioned in the Schedule, or such of them as the Court should be of opinion that he was entitled to inspect.

The only Deeds which the Defendant objected to produce were the Purchase-deeds.

Mr. *Agar*, Mr. *Sugden*, and Mr. *Farrar*, for the Plaintiff, contended that the Purchase-deeds ought to be produced, and cited *Taylor v. Milner* (a), *Beckford v.*

(a) 11 Ves. 41.

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Wildman (b), *The Princess of Wales v. Lord Liverpool (c)*, and *Balch v. Symes (d)*, and relied on the following passage of the Judgment in the last Case : " Where a Deed is sought to be impeached, the Plaintiff is entitled to have it produced, and no Lien can protect the Defendant from producing it; for it is the object of the Suit that the Deed may be declared a nullity." They added that it was common, in Tithe Bills, to allege that Deeds and other Documents were in the possession of the Defendant, from which it would appear that the Plaintiff was entitled to Tithes in kind.

Mr. *Heald*, for the Defendant, distinguished *Taylor v. Milner*, and *Beckford v. Wildman*, from the present Case, saying that the Motion in the former was for the production of Letters only, and had nothing to do with Deeds, and, in the latter, to have Deeds impounded in the Master's Office until the hearing; he added that the Court would never compel a production of Deeds if the Answer denied that the Plaintiff had any Title to the relief prayed by his Bill; that here all the allegations of Fraud, and, consequently, the whole equity of the Plaintiff, were entirely denied; and that, if this Motion were granted, a person who wanted to see a Deed belonging to another for the purpose of picking a hole in it, would have nothing to do but to file a Bill containing a fictitious Case of Fraud, and then to move for the production of the Deed.

The *Vice-Chancellor* said that, where a Defendant referred to his Schedule as containing all Deeds, Papers, &c. in his custody or power relating to the matters in question, there the Plaintiff was entitled to the inspection of all such Deeds, Papers, &c. as of course; unless

(b) 16 Ves. 438. (c) 1 Swan. 114. (d) 1 Turn. 87.

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appeared, by the description of any particular Instrument in the Schedule, or by Affidavit, that it was evidence, not of the Title of the Plaintiff, but of the defendant, or that the Plaintiff had otherwise no interest in its production; and he ordered the Defendant to produce all the Deeds mentioned in the Schedule, except the Purchase-deeds.

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HEMMING v. GURREY.

5th May.

Will.
Construction.

THOMAS HEMMING, by his Will, gave an Annuity of 100*l.* a year to the Plaintiff, *Richard Hemming*, for his Life, and appointed *George Hemming* his Executor and Residuary Legatee. He afterwards made a codicil to his Will in the words following: "I do hereby give and bequeath to my Nephew *Richard Hemming*, the further sum of 200*l.* per annum in addition to what I have already given him by my Will, provided he discharges the Bonds he now stands indebted to me, which now amount to upwards of 2000*l.*; and if in case he shall pay off 1,000*l.* of what he stands indebted to me, in that case he will be to receive of my Executor 50*l.* per annum, but I recommend my Executor to lean on the side of mercy to him, and if he reforms his life to be liberal towards him." The Testator died in the year 1801.

An Annuity of 200*l.* was bequeathed to *A.*, provided he paid 2,000*l.* due to the Testator; but if he paid 1,000*l.* then an Annuity of 100*l.*, with a recommendation to the Executor to lean on the side of mercy, and to be liberal to him. *A.* paid off 1,400*l.* The Executor (who was also residuary Legatee)

paid the Annuity of 200*l.* during his Life, and waved in writing, but did not formally release, the remainder of the Debt; his Executor may, notwithstanding, withhold the Annuity until the remainder of the Debt is paid; *Semble*.

Held, that a second Will was made, if not wholly, yet, as to the greater part, in substitution of the first, from the similarity of the form and expressions of the two Instruments, and of the Annuities and Legacies, and from the gifts of two Estates specifically devised.

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 GURNEY.

The Plaintiff paid to the Testator in his lifetime 1,400 *l.* in part of the sums due on the Bonds, and, after the death of the Testator, *George Hemming* agreed to pay to the Plaintiff the full Annuity of 200 *l.* under the Codicil, and to wave all further claim in respect of the 2,000 *l.* This Agreement was evidenced by the following Memorandum, signed by *George Hemming*, in the Book of his Executorship Account: "I presume *Richard Hemming* has paid off 1,400 *l.*, but I wish to wave all further Claims respecting the 2,000 *l.*, and to allow him the full amount for Life of 200 *l.*, and the 100 *l.* in the Will, making 300 *l.* per annum. Witness my hand *George Hemming*."

George Hemming afterwards advanced 200 *l.* to the Plaintiff, to enable him to purchase two tontine Shares for his Children, and, upon that occasion, it was agreed that the 200 *l.* should be considered as a Purchase of 20 *l.* a year, part of his Annuity, and that, from thence, he should be paid 280 *l.* per annum in lieu of 300 *l.*: whereupon the following Entry was made by *George Hemming* in the Book of his Executorship Account.

"*Richard Hemming* having received 200 *l.* for the purpose of purchasing two Shares for his Children in Mr. Drew's tontine, for which, as his Annuity was only on his Life, 20 *l.* per annum was deducted."

George Hemming continued to pay the 280 *l.* per annum to the Plaintiff, and died in 1807, having left two Testamentary Papers. The first of these Papers was dated on the 28th of May 1780, and was as follows:

In the name of God, amen. I, *George Hemming*, of Bond-street, in the City of Westminster, Goldsmith, being

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GURREY.

perfect mind and memory, make this my last Will and testament: *Imprimis*, I bequeath to my dear and faithful Wife, *Anne Hemming*, 500*l.* sterling, *per annum*, for her Life, to be placed in and payable out of the Long Annuities, and to stand in her Name, and in the Names of my Father, *Thomas Hemming*, and my Friends *Thomas Asdby* and *James Gurrey*, in trust for the use of my Wife for her Life, payable half-yearly; and at her decease, my Father, *Thomas Hemming*, for his Life, remainder to my Cousin, *Richard Hemming*, Son of my Uncle *George Hemming*, and absolutely for his Use, upon his attaining twenty-five years of age, if the forenamed Parties are dead, till that time in the same Trusts, the Party interested to choose a new Trustee upon the death of either taking place.

To *Eleanor Gurrey*, wife of the aforesaid *James Gurrey*, bequeath 50*l.* sterling *per annum*, for her Life, out of the Long Annuities, and in the same Trusts as above, remainder of the Term after her death to the Children of *Eleanor Gurrey*, by *James Gurrey*, Share and Share alike, upon their becoming of age each Child to have their respective Share transferred to them; but the foregoing Devise is not to take place except *James* and *Eleanor Gurrey* do assign their Share in an Estate called *the Barrow*, to *John Weaver*, and his Wife, as is after directed, in the fullest manner in their power.

To *Jane Gilley* and *Benetta Gilley* I do bequeath 50*l.* *per annum* to each of them for Life, in the same Trusts as aforesaid; but in both instances the Name of the Parties intended to be benefited to stand in the Blank Books with the Trustees; and, in case of the death of either *Jane* or *Benetta*, the deceased's Interest for

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the remainder of the Term to go to my Wife absolutely, and at her disposal ; but, in case of her death previous, then to *Thomas* or *Richard Hemming*, as before.

To *Catherine Gilley*, 250 *l.* sterling, provided she assigns all her Interest in the *Barrow* to *John Weaver* and Wife ; and I recommend her to place it in the Long Annuities for her Life, and convey it to her Children, if any, as she may be married for aught I know ; and if so, I hope happily, believing her deserving : To *John* and *Mary Weaver* I bequeath the Share of *James Gurrey*, and Wife *Catherine Gilley*, and the two Shares I bought of *Jane* and *Benetta Gilley* : and I request my Wife will assign her Share in the *Barrow* Estate absolutely to *John* and *Mary Weaver*, for their joint Lives, and, at their decease, to their Children equally ; but I recommend them to sell the Estate ; but if so, they must place the Money in the Trusts aforesaid, for the use of their Children at their death, and when of age, or forfeit this bequest.

To my Wife's five Sisters 50 *l.* each, over and above all the foregoing Bequests, they giving up all Papers they may hold respecting payment of Money, especially *Jane* and *Benetta*.

To my dear Wife, my Estate at *Edgware*, absolutely, as she seemed fond of it ; but request she never builds there to make a residence, knowing, although she likes it now, it would not be suitable for to reside at. If she does not part with it, I recommend it to be left by her to *Richard Hemming*.

I leave to *Felix Vaughan*, Son of *Samuel Vaughan*,

500 *l.* in the same Trust, till of age, then absolutely, hoping he will be advised by my Trustees.

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I leave to *Thomas Laver*, as some return for his Father's faithful Services, 500 *l.* in the same manner as I have done above to *Felix Vaughan*.

To my respected Friend, *Alexander Barter*, Esquire, a piece of Plate of 100 Guineas Value, if he be alive at my decease.

To *Mary Mapletoft*, and *Beatrix Peirce*, each 100 Guineas, for their sole use and benefit.

To my dear Wife 3,000 *l.* absolutely at her disposal, and to her sole use.

To my dear Father, my Share of *Ingatestone* Estate; and to him, *Thomas Ludbey*, and *James Gurrey*, my three Executors, 500 *l.* each, and likewise to my Wife all my Household Furniture, Pictures, and whatever I may die possessed of, the rest and residue of all my effects, appointing her to act as Trustee in conjunction with the above-named, believing firmly she will benefit and show kindness to all those she knew I esteemed, or that were deserving. I likewise bequeath my esteemed Friend *John Brewster*, Esquire, 100 Guineas. If his death takes place previous to mine, then equally to his Children.

As to my Wife, if she does marry again, which I by no means disapprove of, I hope she will gain one deserving her, and that will esteem her as she deserves; only advising her to have her fortune settled upon her

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... to Children previous to Marriage. Witness my
hand this 25th of May 1780."

The other Paper was as follows :

August 26th, 1780.--I, *George Hemming*, of *Bond-*
street, Goldsmith, being of sound mind and memory, do
make and ordain this to be my last Will and Testament.
In primis, I bequeath to my dear Wife *Ann Hemming*,
formerly *Ann Gilley*, so much Money as will purchase
500 *l.* sterling, *per annum*, in the Long Annuities, granted
by Government, and the Income thereof to be received
by the said *Ann Hemming* during her Life, for her own
use and benefit, and, at her death, to my Child or
Children, for their own use and benefit, equally. In
default of Issue, then to my Father *Thomas Hemming*,
for his Life, and at his death to go to my Nephew
Richard Hemming, for the remainder of the Term, or
absolutely at his disposal, when the said *Ann* and
Thomas Hemming are both dead ; the Principal at my
death to be placed in the Names of *Ann Hemming* —
my Wife, my dear Father *Thomas Hemming*, my value —
Friend *Thomas Ludbey*, and my worthy Kinsman —
James Gurrey, in Trust for the said *Ann*, or my £.
Children, and *Thomas Heming*, during their
lives respectively ; supposed at or about - 9,000 —
I bequeath to my Nephew *Richard Hemming*,
after the four following Shares are purchased
and assigned over to my Executors, all the
Estate called the *Barrow*, in the County of
Hereford - - - - - 1,000
I bequeath to *John* and *Mary Weaver*, 200 *l.*,
provided they assign their Share and Right
in the *Barrow* Estate to my Executors - 200

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|---------------------------------------------------------------|-----|---------|
| I likewise bequeath to the said <i>Mary Weaver</i> | £. | 1825. |
| 50 <i>l. per annum</i> in the Long Annuities, for | | |
| her life, and, at her death, to the Issue of | | HEMMING |
| her Body by <i>John Weaver</i> ; in default of | | v. |
| Issue, then at her disposal - - - | 900 | GURREY. |
| I bequeath to <i>James</i> and <i>Eleanor Gurrey</i> , in | | |
| like manner, 200 <i>l.</i> for their Share in the | | |
| <i>Barrow</i> Estate - - - - - | 200 | |
| I bequeath to <i>Eleanor Gurrey</i> , Wife of <i>James</i> | | |
| <i>Gurrey</i> , 50 <i>l. per annum</i> in the Long Annuities, | | |
| for her life, and, at her death, equally | | |
| to the Issue she may have by <i>James Gurrey</i> ; | | |
| in default of such Issue then at her disposal | 900 | |
| To <i>Jane Gilley</i> I bequeath 50 <i>l. per annum</i> in | | |
| the Long Annuities, absolutely at her disposal, | | |
| in lieu of any other Annuity I may | | |
| have granted to her - - - - - | 900 | |
| To <i>Benetta Gilley</i> I bequeath 50 <i>l. per annum</i> | | |
| in the Long Annuities, at her disposal, in | | |
| lieu of any other Annuity I may have | | |
| granted to her - - - - - | 900 | |
| To <i>Catherine Gilley</i> , Sister of the before- | | |
| named, I bequeath 300 <i>l.</i> provided she do | | |
| make a good Assignment of her Share of the | | |
| <i>Barrow</i> - - - - - | 300 | |
| To my dear Wife 200 <i>l.</i> for the same purpose - | 200 | |
| To my dear Wife <i>Ann Hemming</i> I leave my | | |
| Estate of Meadow Land at <i>Edware</i> in | | |
| <i>Middlesex</i> , for her sole use and benefit, but | | |
| do not recommend her to build at or reside | | |
| there; if she finds that my Nephew <i>Richard</i> | | |
| <i>Hemming</i> is deserving, then she may leave it | | |
| to him, if she approves: but if I should leave | | |
| Issue, then, after my Wife's decease, I will | | |

| | | |
|--------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|
| 1825. | and devise this Estate to the said Issue for ever | £. |
| | | 1,500 |
| HEMMING v. GURNEY. | To my dear Wife, <i>Ann Hemming</i> , I leave my House in <i>Tottenham Court Road</i> | 850 |
| | I leave to my dear Wife, to be paid to her within one month from my decease, 200 <i>l.</i> , and desire that all the bequests that relate to her may be settled as soon as possible after my decease, in order that she may be in the receipt of her Income | 200 |
| | To <i>Felix Vaughan</i> , my Nephew, to be placed in Trust till of age | 500 |
| | To <i>Richard Hemming</i> , my Nephew, in the same manner | 500 |
| | To <i>Thomas Laver</i> , Son of <i>Benjamin Laver</i> , as a token of my esteem, in Trust till he is of age | 500 |
| | To my respected friend <i>Alexander Baxter</i> , Esq. a piece of Plate, if he is alive, value of 100 guineas | 105 |
| | To <i>Beatrice Pierce</i> and <i>Mary Mapletoft</i> , for their sole use, 100 guineas to each | 210 |
| | | <hr/> £. 18,865 ⁿ |

It will be observed that the concluding part of the first Will was wholly omitted in the second, which contained no appointment of Executors, nor any residuary bequest. Both these Papers were proved in the Ecclesiastical Court by the Executors named in the first of them.

After the death of *George Hemming*, *Anne Hemming*, his Widow, continued to pay to the Plaintiff, *Richard Hemming*, the Annuity of 280*l.* per annum under the Will of *Thomas Hemming*. She died in 1818.

The present Suit was instituted by *Richard Hemming* against the Personal Representatives of *Thomas Hemming*, *George Hemming* and *Anne Hemming*, for the purpose of enforcing the payment of the Annuity of 280*l.* under the Will of *Thomas Hemming*; and also of the two Annuities of 500*l.* each under the two Testamentary Instruments of *George Hemming*, which the Plaintiff insisted were cumulative.

1825.
HEMMING
v.
GURREY.

Mr. *Hart*, and Mr. *Perkins*, for the Plaintiff:—

1st, As to the Annuity of 280*l.*, the acts of *George Hemming* amount to an actual release of the Debt. It would be contrary to all the principles of Equity to allow an Executor to enforce payment of a Debt which the Testator himself, under his hand, has declared he did not intend to claim. But especially under the circumstances of this Case, considering the expressions in the Will of *Thomas Hemming*, and the written declaration of *George Hemming*, the Court cannot consider the Executor entitled to set up any demand, in respect of that Debt, against the Plaintiff.

2dly. As to the Annuities of 500*l.* each given to the Plaintiff by each of the two Testamentary Papers, that given by the latter Paper cannot be considered as a substitution of the Annuity given in the former, as there is not that double coincidence which has been held necessary to enable the Court to decide that the latter Gift was a substitution for the former. *Hurst v. Beach* (a), *Attorney General v. Harley* (b), *Gillespie v. Alexander* (c).

Mr. *Heald*, Mr. *Boteler*, and Mr. *Wigram*, for the Defendant, were desired by the *Vice-Chancellor* to con-

(a) 5 Madd. 351. (b) 4 Madd. 263. (c) Ante, p. 145.

1825.

HEMMING
v.
GURNEY.

fine themselves to the first point, as to the Annuity of 280*l.*

There has been no act amounting to a release of the Debt due by the Plaintiff. The Memorandum of *George Hemming* is not sufficient. It would not have bound himself, and therefore cannot be held to bind his Executors. The result of repeated decisions is, that no act of Bounty which has not been perfected by a Testator, can be held to avail against his Executor. *Adams v. Claxton (d)*, *Hooper v. Goodwin (e)*, *Cotteen v. Missing (f)*.

The VICE-CHANCELLOR:—

It is plain that it was not the purpose of *G. Hemming*, or of his Widow and Residuary Legatee, *A. Hemming*, to enforce the Payment of the Money remaining due from the Plaintiff on his Bonds, as the condition of his being entitled to the full Annuity of 280*l.* under the Will of *J. Hemming*; but it is quite another question whether any act was done which could conclude their Representatives from enforcing such Claim. It does not appear whether the Bonds for 2,000*l.* were ever delivered up to the Plaintiff, or cancelled or destroyed, and I shall therefore direct an inquiry before the *Master* upon those Points, with liberty to the *Master* to state any circumstances specially.

With respect to the Plaintiff's claim of two Annuities of 500*l.* each, under the two Testamentary Papers of *G. Hemming*, I am of opinion that the second Instrument was not made as an addition to, but as a substitu-

(*d*) 6 Ves. 226. (*e*) 1 Swan. 485. (*f*) 1 Madd. 176.

tion for, the first, if not wholly, at least in the greater part, and plainly as to the Annuities in question. This is evident from comparing the form and expressions of the two Instruments, from the general similarity of the two Annuities and Legacies, and from the particular gifts of the *Barrow* and *Edgware* Estates.

1825.
HEMMING
v.
GURNEY.

Declare, therefore, that the Plaintiff is entitled to one Annuity of 500 *l.* only under the Will of *G. Hemming*.

MELLOR v. HALL.

1825.
6th & 13th
May.

THE time for answering having expired, and the Defendant not having obtained an Order for further time, an Attachment was issued against him. The Defendant afterwards tendered to the Plaintiff the Costs of his Contempt, and then put in a general Demurrer.

Practice.

Mr. *Skirrow*, for the Plaintiff, now moved that the Demurrer might be taken off the File for irregularity. He referred to *Gilb. For. Rom.* 71; *Beames's Ord. Cha.* 178; *Hind's Practice*, 115; *Pract. Reg.* 163; *Harr. Ch. Pract.* 214 (a); *Sowerby v. Warder* (b); *E. India Comp. v. Henchman* (c); *Curzon v. Lord De la Zouch* (d); *Broughton v. Jones* (e).

A Defendant, against whom an Attachment had issued for want of an Answer, tendered the Costs of the Contempt, and then filed a Demurrer. The Demurrer was ordered to be taken off the File.

Mr. *Bethell*, *contra*, cited *Waters v. Chambers* (f), and *Sanders v. Murney* (g).

- | | |
|-------------------------------|-------------------------------|
| (a) But see <i>Ibid.</i> 215. | (e) 3 <i>Madd.</i> 42. |
| (b) 2 <i>Cox</i> , 268. | (f) <i>Ante</i> , 1 Vol. 225. |
| (c) 3 <i>Bro. C. C.</i> 372. | (g) <i>Ibid.</i> |
| (d) 1 <i>Swan.</i> 185. | |

1825.

MELLOR
v.
HALL.

The VICE-CHANCELLOR:—

It is clear, that, after an Attachment, unless it be an Attachment with Proclamations returned, a Defendant, upon payment or tender of his Costs, may put in a Plea or Answer without special Order. The question is, whether he can demur alone in such case, as well as answer. The language of Lord *Clarendon's* Order, and the text of the Lord Chief Baron *Gilbert*, seem to import no difference in this respect: but in the Cases referred to, from 3d Bro. C. C. and 2d Cox, it is expressly stated that a Defendant cannot demur alone after process of Contempt has issued against him; and I find that such is the received practice at this day. This Demurrer, therefore, must be taken off the File.

Reg. Lib. B. 1824, f. 1151.

END OF PART II.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

WRIGHT v. ROSE.

1825.
28th April.

Conversion.

THE Bill stated that *Joseph Wright* was seised in Fee of a Freehold Estate; that he borrowed 300*l.* from *James Rose*, the Defendant, and secured the repayment of it, with Interest, by executing a Mortgage Deed of the Estate, with a Power of Sale; and that, by the terms of the Deed, it was provided that the Surplus Monies to arise from the Sale, in case the same should take place, were to be paid to *Wright*, his Executors or Administrators (a).

Where a Mortgage Deed contains a Power of Sale, with a Direction that the Surplus Produce shall be paid to the Mortgagor, his Executors and Administrators, if a Sale takes place in the lifetime of the Mortgagor, the Surplus is *Personal Estate*.

In 1822, *Wright* died intestate, and without ever having been married. All the Interest due on the Mort-
sonal Estate; but if, after his Death, it is

(a) It did not appear on the face of the Bill to whom the Right of Redemption was reserved.

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1825.

WRIGHT

v.

ROSE.

gage Money had been duly paid by him up to the time of his Death, but the Principal remained unpaid.—The Interest that accrued due after his Death having remained unpaid, *Rose*, the Mortgagee, entered into Possession, and afterwards sold the Estate under the Power of Sale, for a Sum which considerably exceeded the Mortgage Money and Interest.

Joseph Wright, the Mortgagor, was an illegitimate Child, and, having died without Issue, a Claim was set up on the part of the Crown to the mortgaged Estate. But, on inquiry being made as to the value of the Property, it was found to be subject to the Mortgage, and the Claim was abandoned : and, after the Sale, Letters of Administration of the Estate of *Joseph Wright* were granted to the Plaintiffs.

The Bill, after setting forth these facts, and alleging that a large Surplus remained in the hands of the Defendant, *Rose*, after satisfying the Mortgage Debt and Interest, prayed that an Account might be taken of the Monies produced by the Sale, and of the Amount due in respect of the Mortgage ; and that the Defendants might be decreed to pay over the Surplus to the Plaintiffs as the Personal Representatives of *Joseph Wright*.

To this Bill the Defendant put in a general Demurrer for want of Equity, which now came on to be argued.

Mr. *Cooper* for the Bill.

Mr. *Koe* for the Demurrer.

The VICE-CHANCELLOR :—

If the Estate had been sold by the Mortgagee in the lifetime of the Mortgagor, then the Surplus Monies

would have been Personal Estate of the Mortgagor, and the Plaintiffs would have been entitled. But the Estate being unsold at the death of the Mortgagor, the Equity of Redemption descended to his Heir, and he is now entitled to the Surplus Produce.

1825.
WRIGHT
v.
ROSE.

Demurrer allowed.

FOX v. MOREWOOD.

20th May.

Practice

ON the 12th of April the Defendant obtained an Order to dismiss the Bill for want of Prosecution.

A second Order to dismiss cannot be obtained on the Day on which a former Order to dismiss is discharged.

On the 30th of the same month, the Plaintiff, on special grounds, moved for and obtained an Order discharging the Order to dismiss. On the same day, the Defendant, on a Motion of Course, obtained a new Order to dismiss the Bill for want of Prosecution, and, on that same day also, the Plaintiff filed his Replication.

The Court was now moved, on behalf of the Plaintiff, to discharge the last Order to dismiss, for Irregularity.

Mr. *Swanston*, for the Motion:—

Reynolds v. Nelson (a), decided that an Order to dismiss a Bill cannot be obtained if a Replication be filed on the day on which the Motion is made. *Lorimer v. Lorimer* (b), decided that an Order to dismiss operated from the time when it was pronounced.

(a) 5 Madd. 60.

(b) 1 Jac. & Walk. 284.

1825.

Fox
v.

MOREWOOD.

Mr. *Whitmarsh*, for the Defendant, relied on the facts, that, after the Defendant had on the 30th of April moved to dismiss the Bill, he on the same day obtained the usual Certificate from the Clerk in Court of the Answer having been filed in February 1824, and that, at the time when that Certificate was obtained, the Replication had not been filed, and that it was not filed for some hours afterwards.

The *Vice-Chancellor* discharged the Order to dismiss of the 30th of April, with Costs, stating, that, besides the authority of *Reynolds v. Nelson*, there was another objection: that, there being no fraction of a day, the second Motion to dismiss could not be made on the same day as the former Order to dismiss was discharged.

DIXON v. DAWSON.

SLAWIN v. FAR SIDE.

1825.
20th and 29th
June.

Will.
Leaseholds.
Conversion.

ALICE SHEPHERD devised certain Messuages and other Hereditaments to *William Bramley*, charged with the payment of 100 l. to her Executors and Trustees, to be applied in discharging such of the Legacies mentioned in her Will as the same might legally be applied to discharge, and after giving some specific Legacies expressed herself as follows :

" I do hereby give, devise and bequeath all my Messuages, Dwelling-houses, Buildings, Lands, Tenements, Hereditaments and Real Estate whatsoever, and where-soever, and of what nature or kind soever, not hereby otherwise disposed of (the Copyhold part whereof I have surrendered to the use of this my Will), with the Rights, Privileges, Members and Appurtenances thereto respectively belonging, unto and to the use of my Friends the Rev. *John Tripp*, *Watson Farside*, and

Testatrix devised all her Messuages, Lands, Tenements, Hereditaments and Real Estate to Trustees, in trust to sell, and out of the Produce to pay her Funeral and Testamentary Expenses and Legacies, except her Charitable Legacies, which she directed to be paid out of her

Personal Estate, legally applicable to that purpose, and not out of any part of her said Messuages, Lands, &c. which she might die seised or possessed of; and she also directed her Trustees to keep separate accounts of the Proceeds of her Messuages, &c. and of her Personal Estate legally applicable for Charitable Purposes; and that, if the Proceeds of her Messuages, &c. should be insufficient to pay the Legacies directed to be paid therewith, the Trustees should apply her Personal Estate in payment of such Legacies: Held, 1st, that notwithstanding the Personal Estate was more than sufficient to pay the Charitable Legacies, no part of it could be applied to pay the other Legacies until the Proceeds of the Real Estate were exhausted: 2d, that the Testatrix's Leaseholds passed to the Trustees, under the devise of all her Messuages, &c.: 3d, that her Heir and next of Kin, and not her Residuary Legatee, were entitled to the Surplus Proceeds of her Freeholds and Leaseholds: and 4th, that the Freeholds having been properly sold in the Heir's lifetime, the Surplus was part of his Personal Estate.

1825.

DIXON
v.
DAWSON.

SLAWIN
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FARNSIDE.

Robert Stockdale, their Heirs, Executors, Administrators and Assigns, according to the nature and tenure thereof respectively, upon the trusts nevertheless, and to and for the uses, intents and purposes, and under and subject to the provisos and declarations hereinafter mentioned, expressed and declared of and concerning the same: And I do hereby give and bequeath unto and to the use of the said *John Tripp, Watson Farnside, and Robert Stockdale*, their Executors, Administrators and Assigns, all my Money, Securities for Money, Goods, Chattels, and all other my Personal Estate and Effects whatsoever, not hereby otherwise disposed of, upon the trusts, and to and for the uses, intents and purposes, and under and subject to the provisos and declarations hereinafter mentioned, expressed and declared of and concerning the same (that is to say) upon trust that they the said *John Tripp, Watson Farnside, and Robert Stockdale*, and the Survivor and Survivors of them, and the Heirs, Executors and Administrators of such Survivor, do and shall, as soon as conveniently may be after my Decease, sell and absolutely dispose of all and singular the said Messuages, Buildings, Lands, Tenements, Hereditaments and Real Estate devised to them as aforesaid, and also call in and compel payment of all sum and sums of Money which may be due and owing to me at the time of my Decease, and do and shall absolutely sell and convert into Money all other my Goods, Chattels, Personal Estate and Effects bequeathed to them as aforesaid, which shall not consist of Money; and that they my said Trustees do and shall take and keep an account of the Monies and Produce arising from the sale of my said Messuages, Buildings, Lands, Tenements, Hereditaments and Real Estate, and also a distinct and separate account of the

ready Money I may happen to have by me at the time of my Décease, and of my Money which may then be placed out at Interest, and also of the Money arising from the sale of such of my Personal Estate, Substance and Effects as are hereby saleable, and legally applicable for the charitable Purposes herein mentioned: And upon further trust that they the said *John Tripp, Watson Farside*, and *Robert Stockdale*, and the Survivors and Survivor of them, and the Heirs, Executors and Administrators of such Survivor, do and shall, in the first place, by, with and out of the Money to be raised by the sale of my said Messuages, Buildings, Lands, Tenements, Hereditaments and Real Estate devised to them as aforesaid, pay and discharge all my just Debts, and also the Expenses of my Funeral, and of the erection of a Tombstone, and of the Protection, Repairs, Preservation thereof, and all other Expenses in anywise concerning my Burial, and also the Probate and registering of this my Will, and all other incidental Expenses hereby directed to be paid thereout: And upon further trust, that they the said *John Tripp, Watson Farside*, and *Robert Stockdale*, and the Survivors and Survivor of them, and the Heirs, Executors and Administrators of such Survivor, do and shall, by, with and out of the Money arising from the sale of my said Messuages, Buildings, Lands, Tenements, Hereditaments and Real Estate, if the same shall be sufficient for that purpose, pay and discharge the several Annuities now subsisting and payable under and by virtue of the Will of my late Brother *Francis Shepherd*, deceased, and also the several Legacies and sums of Money hereby given and bequeathed, or directed to be paid or applied, to and for the use of the several Legatees and Persons after named, except the Annuities hereby

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DIXON
v.
DAWSON.

SLAWIN
v.
FARFIDE.

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DIXON
v.
DAWSON.

SLAWIN
v.
FARSIDE.

directed to be paid unto my Relations *Mary Guiseley* and *Sarah Guiseley*, and also except the Legacies and sums of Money hereby directed to be paid or applied to or for charitable uses and purposes, which I hereby direct to be paid out of the Money I may have in my Possession and out at Interest at the time of my Decease, and out of the Money arising from the Sale of such of my Personal Substance and Effects as are hereby made saleable and legally applicable for such purposes, and not out of the Money arising from the sale of my said Messuages, Buildings, Lands, Tenements, Hereditaments or Real Estate, or any part thereof. But in case the Money arising from the Sale of my said Messuages, Buildings, Lands, Tenements, Hereditaments and Real Estate shall be insufficient for the payment of the several Annuities, Legacies and sums of Money hereby directed to be paid therewith, then upon further trust that they the said *John Tripp*, *Watson Farside*, and *Robert Stockdale*, and the Survivors and Survivor of them, and the Executors and Administrators of such Survivor, do and shall (after having first paid and applied the whole of the Money arising from the Sale of my said Messuages, Buildings, Lands, Tenements and Real Estate according to the directions of this my Will) pay and apply so much of my Money and Personal Estate, as may be necessary, in and towards the payment of the said several Legacies and sums of Money to and for the use of the several Persons after-mentioned; that is to say,—[Here followed Trusts for payment of several pecuniary Legacies to the Testatrix's Friends, Relations and Servants, with a direction that they should be paid at the expiration of twelve calendar months after her Decease, or as soon after that time as her Estates should be disposed of and the Purchase Money received for the

same, and also for the payment of Legacies of 21*l.* and 200*l.* to the Treasurers of two Charitable Institutions,] which two said several sums of 21*l.* and 200*l.* I do hereby direct shall be raised and paid out of my ready Money, and such part of my Personal Estate as by Law I may or can charge with the payment thereof, (and not out of any part of my Lands, Tenements, Hereditaments or Real Estate), and be respectively applied towards carrying on the benevolent designs of the said several Societies: And upon further trust, that they the said *John Tripp, Watson Farside, and Robert Stockdale*, or the Survivors or Survivor of them, or the Executors, Administrators or Assigns of such Survivor, do and shall, by, with and out of such part of the Money I may have in my Possession and placed out at Interest at the time of my Decease, and of the Money arising from the sale of my Personal Estate and Effects hereby made saleable only as may be legally applied for the purposes after-mentioned, (and not out of any part of my said Messuages, Lands, Tenements, Hereditaments or Real Estate which I may die seised or possessed of,) place out and invest the sum of 3,000*l.*, of lawful money of Great Britain, in the purchase of Stock in the three per Cent. Consolidated Bank Annuities, or three per Cent. Reduced Annuities, in their Names. [The Testatrix then directed her Trustees to pay out of the Dividends of the Stock so to be purchased an Annuity of 60*l.* to *Mary and Sarah Guiseley*, and to pay the residue of the Dividends, and the whole after the decease of the Survivor of these two Annuitants, for certain charitable Purposes.] And upon further trust, that they the said *J. T., W. F. and R. S.*, do and shall lay out and invest the sum of 2,000*l.* of lawful Money of Great Britain, arising from the residue and remainder of my ready Money, and

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Money out at Interest, and of the Money arising from the sale of my Personal Estate and Effects, which may be legally applied for the purposes herein mentioned, and not from and out of any part of my said Messuages, Lands, Tenements, Hereditaments or Real Estate, and not hereby otherwise disposed of, in the purchase of Stock [as in the last Bequest, with directions to apply the Dividends for certain other charitable Purposes. The Testatrix then directed her Trustees to transfer into their own Names 1,000*l.* Navy five per Cents, part of 1,100*l.* like Stock then standing in her Name, and to apply the Dividends for certain other charitable Uses, and to pay out of her Personal Estate and Effects legally applicable for such purposes, two sums of 200*l.* to the Treasurers of two charitable Establishments.] And should any part of my Personal Estate and Effects still remain undisposed of, after satisfying all my just Debts and Funeral and other incidental Expenses, and providing for the said Charities herein mentioned and intended to be hereby established and augmented, and paying the several Legacies or sums of Money herein bequeathed or directed to be paid thereout, then upon further trust that they my said Trustees shall and do pay and transfer the residue and remainder of my said Estate and Effects, not hereby otherwise disposed of, unto my Relation the Rev. Dr. *Wm. Craven*, his Executors, Administrators and Assigns, to and for his and their own use and benefit."

The Testatrix afterwards made a Codicil to her Will, as follows :—

" I, *Alice Shepherd*, of *Knaresborough*, in the County of *York*, Spinster, do make, publish, and declare this

to be a Codicil to my last Will and Testament. I do hereby revoke the Devise unto my Agent, Mr. *William Bramley*, of the Dwelling-houses, Hereditaments and Premises in the occupation of *John Wood*, or his Tenants; and, in lieu thereof, I do hereby give and bequeath unto the said *William Bramley* the sum of 300*l.*, to be paid to him, by my Executors, at the end of twelve calendar months next after my Decease; and I do hereby give, devise and bequeath unto my Executors and Trustees, *John Tripp*, *Watson Farside*, and *Robert Stockdale*, and to their Heirs and Assigns, the said Dwelling-houses, Lands, Tenements, Hereditaments and Premises, situate within the Manor of *Thornton* with *Bishopside*, in the County of *York*, and now or late in the occupation of *John Wood* or his Tenants, upon trust to surrender and convey the same unto *James Ingleby*, the Purchaser thereof, his Heirs and Assigns, upon payment of the Purchase Money, and according to the Agreement I have entered into with him; and upon trust to apply such Purchase Money as part of my Personal Estate, according to the directions and in the manner mentioned in my said Will respecting my Personal Estate; and I do hereby confirm my said Will in all other respects."

The Testatrix left *Philip Dixon* her Heir at Law, and Customary Heir.—The Trustees sold all her Real Estates in *Dixon's* lifetime, but her Personal Estate was more than sufficient to pay her Funeral Expenses, Debts and Charitable Legacies. *Dixon* afterwards died, having appointed his three Children his Executors. *William Dixon*, the eldest of them, also died, leaving *Sarah*, the Wife of *John Slawin*, his Heir at Law and Personal Representative.

1825.

DIXON
v.
DAWSON.

SLAWIN
v.
FARSIDE.

1825.

DIXON
v.
DAWSON.

SLAWIN
v.
FARSID.

The Parties to these Causes were the surviving Children of *Philip Dixon*; *Richard Dawson*, the Executor of *Stockdale*, Dr. *Wood*, the Executor of Dr. *Craven*, *Richard Terry*, the Executor of *Farside*, who survived his Co-Executors, and Mr. and Mrs. *Slawin*.

Mr. *Hart*, Mr. *Tinney*, and Mr. *Daniell*, for the Plaintiffs, the Personal Representatives of *Philip Dixon*:—

1st, The Real Estate is made the primary Fund for payment of Debts and Legacies, in order to make the Personal Estate a clear Fund for the Charities, and not with any intention of benefit to the Residuary Legatee. *Hill v. Cock (a)*.

2d. The devise and bequest of the Real Estate includes the Leasehold Estates. *Addis v. Clement (b)*, *Thompson v. Lawley (c)*. The Leasehold Estates must therefore at any rate bear a portion of the Debts and Legacies.

3d. The Residuary Bequest does not carry the Surplus of the Real Estate to the Residuary Legatee, but is undisposed of. *Robinson v. Taylor (d)*, *Maugham v. Mason (e)*.

4th. The Real Estate having been sold, the Surplus is Personal Estate of the Heir. *Smith v. Claxton. (f)*.

(a) 1 V. & B. 173. (b) 2 P. W. 456. (c) 2 Bos. & Pull. 303.
(d) 2 Bro. C. C. 589. (e) 1 V. & B. 410. (f) 4 Madd. 484.

Mr. *Sugden*, and Mr. *Pepys*, for Dr. *Wood*, the Representative of the Residuary Legatee:—

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DIXON
v.
DAWSON.
SLAWIN
v.
FARSIDE.

1st. In every clause in the Will the Real Estate is mentioned, which shows that the distinction between Real and Personal Estate was all along clearly in the view of the Testatrix. It is a fancied construction to say, that the Residuary Legatee is to have no benefit; for the intention must be inferred from the directions in the Will. *Hancor v. Abbey* (g).

2d. The words are not sufficient to include Leasehold Estates. Where such Estates have been held to pass under a devise of Real Estates, there has always been some word used which has accurately described the Leasehold Estate. Thus, in *Lane v. Earl Stanhope* (h), where a Leasehold Estate was held to pass under the general devise of Real Estates, the word " Farms " was used, and the only Leasehold Estate of the Testator was a Leasehold Farm.

3d. The Surplus of the Real Estate goes to the Residuary Legatee. *Mallabar v. Mallabar* (i), *Durour v. Motteur* (k).

The Answer states that the Residue was paid in 1812 to Dr. *Craven*, who divided it among the Legatees, and in satisfaction of the Charitable Bequests. The question would be, how it could be got back again. Lately, the question has been much agitated at Law, where Money was paid by mistake to a Party who spent it, how it could be got back. The question in these Cases

(g) 11 Ves. 179.

(i) Ca. Temp. Talb. 78.

(h) 6 T. R. 545.

(k) 1 Ves. 320.

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has been, whether the Claim, after the Money was paid away under an honest impression, was not too late.

Mr. *Belt*, for the Heir at Law, referred to *Robinson v. Taylor* (*l*), and observed, that the Funds here had been kept distinct by the Testator, whereas in the Cases cited on behalf of the Residuary Legatee, the Funds had been mixed. In this Case the produce of the Real Estate had never been received.

Mr. *Horne*, and Mr. *Harrison Batley*, for *Dawson*, the Executor of *Stockdale*.

Mr. *Barber* for *Terry*, the Representative of *Farside*.

The VICE-CHANCELLOR:—

The Testatrix in this Case expressly directs the produce of her Real Estate to be applied in payment of her just Debts, Funeral Expenses and Legacies (except her Charitable Legacies), and directs that her Personal Estate which by Law is applicable to Charitable Bequests shall only be applied in payment of her Debts, if the produce of her Real Estate shall prove insufficient for that purpose. She then directs the payment of her Charitable Legacies out of the Personal Estate which by Law is so applicable, and gives over the Residue to her Relation Dr. *Craven*.

The point raised is that, when the Testatrix made the produce of her Real Estate first applicable to the payment of her Funeral Expenses, just Debts and Legacies, except Charitable Legacies, her only purpose

(*l*) 2 Bro. C. C. 589.

was to secure the payment of her Charitable Legacies by means of relieving the Personal Estate, which by Law was applicable to such Payment, from the burthen of her Debts, Funeral Expenses and Legacies; and that, when her Charitable Legacies were all paid, it was not her intention that the Surplus of her Personal Estate should be relieved from the payment of her Funeral Expenses, Debts and Legacies at the expense of her Real Estate. It is very probable that in this arrangement her only purpose was, to secure the payment of her Charitable Legacies; but, as she has expressly directed that her Personal Estate, applicable to Charitable Legacies, shall not be applied in payment of her Funeral Expenses, Debts and general Legacies, until the Produce of her Messuages, Tenements and Real Estate is exhausted, the Court cannot control her clear expressed intention by any conjecture as to her motives.

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In stating the first point, I have, for the sake of conciseness, spoken of the Produce of her Real Estate only; but, when the Testatrix directs the sale of her Real Estate, she uses the words, "All her Messuages, Dwelling-houses, Buildings, Lands, Tenements, Hereditaments and Real Estate whatsoever, and wheresoever, and of what nature or kind soever, not hereby otherwise disposed of;" and the second question is, whether those general words do or not in this Will include Leaseholds for years. It may, I think, be stated, on the Authorities which have been cited, that, if these general words are not aided by other parts of the Will, they will not include Chattel Leases; but, in a subsequent part of her Will, the Testatrix, when speaking of the payment of her Charitable Legacies, expressly directs that they are not to be paid out of any part of the Money arising from the sale of

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any part of her said Messuages, Lands, Tenements, Hereditaments or Real Estate, which she may die seised or *possessed of*; which latter words are applicable to Chattels Real only: and, upon similar words, great stress was laid in the Case of *Addis v. Clement*. It is further to be observed that the Testatrix, who has the same Trustees for all her Property, directs two distinct Accounts to be kept by them, one of the Produce arising from the sale of her Messuages, Buildings, &c., and the other of her Monies, and the Produce arising from the sale of her Personal Estate, which is legally applicable for charitable Purposes. She must have intended the Produce of her Chattels Real to be included in one of the Accounts. They could not be included in the Produce of Personal Estate legally applicable to charitable Purposes; and it is consistent with her whole intention that they should form a part of the other Account, which consisted entirely of Property not applicable to charitable Purposes. My opinion, therefore, is, that the Produce of Chattels Real is applicable, with the Real Estate, in payment of the Funeral Expenses, Debts, and Legacies not charitable.

It appears that the Produce of the Real Estate and Chattels Real was more than sufficient for the payment of the Funeral Expenses, Debts, and Legacies not charitable; and the third question is, what is to become of such Surplus: whether it is to form a part of the Residuary Estate given to Dr. *Craven*, or is undisposed of. The Testatrix, after directing that the Trustees, out of the Monies and the Produce of her Personal Estate, which is legally applicable for charitable Purposes, shall pay the several Charitable Legacies which she enumerates, proceeds thus:—"And should any part of my

Personal Estate and Effects still remain undisposed of, after satisfying all my just Debts and Funeral and other incidental Expenses, and providing for the said Charities herein mentioned, and paying the several Legacies and other sums of Money herein bequeathed, or directed to be paid thereout, then upon further trust, that they my said Trustees shall and do pay and transfer the remainder of my said Estate and Effects, not hereby otherwise disposed of, unto my Relation the Rev. Dr. Craven, his Executors, Administrators and Assigns, to and for his own use and benefit." It will be remembered that this Personal Estate was before expressly subjected to the payment of her Funeral Expenses, Debts, and Legacies not charitable, in aid of her Real Estate. Should any part of her Personal Estate and Effects remain undisposed of after satisfying all the Charges to which she had subjected it, she gives the remainder of her said Estate and Effects to Dr. Craven. "Her said Estate and Effects," is necessarily confined here to her Personal Estate and Effects undisposed of. This Residuary Gift does not, therefore, touch the surplus of her Real Estate and Chattels Real; and, there being no other Residuary Gift, such Surplus is undisposed of, and, as to the Real Estate, belongs to the Testatrix's Heir-at-Law, and, as to her Chattels Real, to her next of Kin. The Division between the Heir-at-Law and the next of Kin must be in proportion to the value of the respective Properties.

At the Death of the Testatrix she left *Philip Dixon* her Heir-at-Law, and her Real Estate was sold by the Trustees in execution of her Will in the lifetime of *Philip Dixon*. *Philip Dixon* died before the Trusts of the Will were completed: and another question is, whether the surplus of the Real Estate which devolved to

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him was vested in him as Land or Money, and belongs now to his Heir or Personal Representative. I adhere to the Principles which I stated in the Case of *Smith v. Claxton*, that, where the whole Land is properly sold by the Trustees, and there is only a partial disposition of the Produce of the Sale, there the Surplus belongs to the Heir as Money, and not as Land. The Surplus in the present Case, therefore, belongs to the Personal Representative of *Philip Dixon*.

The point as to the claim of the next of Kin to the surplus of the Leaseholds was not raised in the Pleadings, and the next of kin of the Testatrix were not before the Court in that character. The *Vice-Chancellor*, to save a supplemental Suit, directed inquiries as to the next of Kin; he said that the Costs must be apportioned between the two Funds made by the Testatrix, but that it was better to reserve the question of Costs until after the Account taken. The second Cause, which was brought by the Heir of *P. Dixon*, was dismissed with Costs.

9th May.
1st June.

DRINKWATER v. COMBE.

Incumbrance.
Executory
Devisee.

If a Tenant of an Estate, subject to an Executory Devise, pays off a Charge upon the Estate, and

the Executory Devise afterwards takes effect, his Executors will be entitled to be repaid the amount of the Charge.

WILLIAM COMBE, being possessed of a Leasehold Estate for a long term of Years, situate at *Great Hampton*, in the County of *Worcester*, by his Will, dated the 19th of February 1760, bequeathed it to his Son *Francis Combe*, for all such Estate as he, the Testator, had therein. He then bequeathed to his Son

Joseph the sum of 300*l.*, to be paid to him at his age of twenty-one years, and to his Daughter *Hannah Sansom*, the sum of 80*l.*, to be paid her within six months next after his Decease, and he charged his Leasehold Estate with the payment of those Legacies, and with the payment of 10*l.* to his Sister-in-law *Winifred Combe*, yearly, during her Life. And, in case *Francis Combe* should happen to die unmarried, he gave the Leasehold Estate to his other two Sons, *William* and *Joseph Combe*, their Executors, Administrators and Assigns, as Tenants in common, subject to the payment of the Legacies and Annuity: and he appointed his Wife, *Ann Combe*, and his Son, *William Combe*, Executrix and Executor of his Will.

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Upon the decease of the Testator, *Francis Combe* entered into possession of the Leasehold Estate, and continued in Possession until his death. He paid the Legacy of 300*l.* to *Joseph Combe*, and the Legacy of 80*l.* to *Hannah Sansom*; and, during the life of *Winifred Combe*, he paid her the Annuity of 10*l.*

An Act of Parliament was passed in the sixteenth Year of the Reign of his late Majesty, intituled, "An Act for dividing and inclosing the Open and Common Fields, and all other Commonable Land, within the Parish of *Great and Little Hampton*, in the County of *Worcester*," by which the several Owners and Proprietors for the time being of any of the Lands thereby directed to be inclosed, being Tenants in Tail, or for Life or Lives only, were empowered, with the consent of the Commissioners appointed to carry the Act into execution, to be testified in writing under their hands and seals, either in and by their Award, or in and by any Deed or Instrument to be executed by them, either before or after the execution of their said Award, from

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time to time to charge the Lands, which should be allotted to such Owners or Proprietors, or Persons entitled as aforesaid respectively, with any sum or sums of Money not exceeding 40s. for each Acre, to be applied for the purposes of defraying their respective proportions of the Charges and Expenses of passing the Act, and other necessary Charges incident to and attending such Inclosure and Division, and the necessary subdivisions of their respective Allotments, and to mortgage such Lands for a term of Years to secure the repayment of such respective sums of Money with Interest. Accordingly the Commissioners, by their Award, dated the 2d of April 1777, allotted forty-four Acres of Land to *Francis Combe*, in respect of the Leasehold Premises bequeathed by the Testator; and consented and testified that it should be lawful for the Owners and Proprietors of the Lands directed to be inclosed, being Tenants in Tail, or for Life or Lives only, to raise, in the manner prescribed by the Act, Money for defraying their proportions of the Charges and Expenses before mentioned, which the Commissioners certified amounted in the whole to 1,528*l.* 8*s.* 11*d.*, and directed to be paid on or before the 10th of April then instant.

Francis Combe paid his proportion of the 1,528*l.* 8*s.* 11*d.*; but did not exercise the Powers, given him by the Act, of charging the Estate with it.

William Combe the Son, and *Joseph Combe*, died in the lifetime of *Francis Combe*, intestate.

Francis Combe died in April 1821, unmarried. The Plaintiffs were his Executors.

The Personal Representatives of *Joseph Combe* and *William Combe* recovered the possession of the Leasehold Premises in an Action of Ejectment, brought against the Plaintiffs.

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The Bill prayed that the Leaseholds might be sold, and that the Sums paid by *Francis Combe* in discharge of the Legacies and the expenses of the Inclosure might be paid to the Plaintiffs.

Mr. *Horne*, and Mr. *Lynch*, for the Plaintiffs :—

If a Tenant in Tail pays off a Charge upon his Estate, his Executors are not entitled to be repaid the Amount, because, though he had not the absolute Interest, he could by certain forms have acquired the absolute Interest in the Estate. But that reasoning does not apply to the case of a person paying off a Charge upon an Estate which is subject to an Executory Devise over; for that person can never acquire an absolute indefeasible Interest in the property. If a Tenant in Tail, under a gift from the Crown, pays off a Charge, he is entitled to be reimbursed by a Charge upon the Estate; because he can never acquire the Fee. That is an analogous case to the present one. The limitation over is in effect the same as the restraint from alienation imposed on a Tenant in Tail by Act of Parliament, for the contingency happening, the Estate is cut down to an Estate for Life. By no possibility, unless he married, could *F. Combe's* Estate have been greater than that of an Estate for Life: therefore, when the Inclosure Act passed, he was only Tenant for Life, and consequently was empowered, by that Act, to charge the expenses of the Inclosure upon the Estate. He did not avail himself of the Power, because he considered him-

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self to be the absolute Owner of the Estate. But we submit that the Plaintiffs are now entitled to be repaid the Expenses out of the Estate. As to the Legacies, the Testator himself contemplated that if the Estate went over, it would still be subject to them. *Ware v. Polhill (a)*.

Mr. Ellison, for the Defendant:—

There is no resemblance between the case of *Francis Combe*, and that of a Tenant for Life: but there is between the case of a Tenant in Tail and *Francis Combe*; for if he had married at any time, the Property would have become his, absolutely. Nor is there any analogy between the present case and that of a Tenant in Tail restrained from alienation by Act of Parliament; for the latter can by no means whatever acquire the absolute Interest in the Property. In *Jones v. Morgan (b)*, Lord Thurlow qualifies the rule as to Charges paid off by a Tenant for Life. He says, that the smallest demonstration that he meant to pay off the Charge, will prevent his Representative from coming for the Money. Here these Expenses were paid forty-three years ago, and *Francis Combe* did no act to show that he meant to charge the Estate. *Countess of Shrewsbury v. the Earl of Shrewsbury (c)*. *Redington v. Redington (d)*. The reasoning in this latter Case applies to the present one. *Francis Combe* might at one time have intended to marry, and then his Estate would have become infeasible.

(a) 11 Ves. 257. 282. (b) 1 Bro. C. C. 206; and S. C. Fearne Cont. Rem. App. No. 3.

(c) 3 Bro. C. C. 120; and S. C. 1 Ves. jun. 227.

(d) 1 Ball & Beat. 142.

The VICE-CHANCELLOR:—

I am not aware that the points here argued have ever been decided. If a Tenant for Life pays off a Charge upon his Estate, the Amount becomes a part of his Personal Property, unless he manifests an intention that it should not do so. If a Ténant in Tail pays off a Charge upon his Estate, the Amount does not become a part of his Personal Property, unless he manifests an intention that it should do so. He who takes an Estate defeasible by Executory Devise, is not like a Tenant for Life; because, upon a contingent event, his Estate may become indefeasible. Nor is he like a Tenant in Tail; because he cannot, at his own pleasure, render his Estate indefeasible. If Tenant in Tail, having the power at his own pleasure to acquire an absolute Fee, and to defeat the Remainder, does not exercise that power, it is reasonable to infer that the Remainder-man is, in a sense, the object of his own choice, and this is the reason of the Rule for presuming, unless the contrary be manifested, that, when the Tenant in Tail pays off a Charge, he means the Estate which, in effect, he gives to the Remainder-man, should descend to him free from the Charge. But he who takes an Estate defeasible by Executory Devise, not having the power to defeat the Devisee over, it cannot be intended that such Devisee is, in any sense, the object of his choice; and there is not, therefore, the same reason for presuming, when he pays off a Charge, that he means to give to such Devisee the amount of the Charge. In this respect, as well as in the quality of his Estate, he who takes such defeasible Estate is more within the principle that applies to the Tenant for Life. So, like a Tenant for Life, he may be restrained from cutting Timber, or committing Waste.

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Declare, therefore, that the Plaintiffs are entitled to have the Charge raised. With respect to the Expenses of the Inclosure, they are, in their nature, a charge upon the *corpus* of the Estate, and fall within the same equitable principle as an actual Charge, and must be repaid to the Plaintiff (e).

(e) See *Wigsell v. Wigsell*, post. p. 364.

9th May.
19th June, and
5th July.

Trust.
Bankrupt.

A Lease was granted to *W.*, who afterwards committed an act of Bankruptcy, and then executed a declaration of Trust in favour of *R.* On the trial of an Issue directed by the Court, it was found that *W.*'s Name was used in trust for *R.*: Held that the Lease did not pass to *W.*'s Assignees.

GARDNER v. ROWE.

BY an Indenture, dated the 23d of January 1812, Lord Mount Edgcumbe granted to George Wilkinson of Newcastle-under-Lyme, liberty to dig for Tin and other Metals and Minerals, for twenty-one years, in a piece of Ground called the *Wheal Regent Sett*. On the 23d of August 1813, Wilkinson executed a Deed, declaring that he was a Trustee of the Lease for the Defendant Rowe. Wilkinson before he executed this Deed had committed an act of Bankruptcy; and, in November following, a Commission of Bankrupt was issued against him, under which he was found a Bankrupt. The Plaintiffs were his Assignees.

At the hearing of the Cause, Rowe contended that the Lease was granted to Wilkinson, in trust for him; and the Court directed an Issue to be tried, to ascertain whether that was the fact. The Jury found a Verdict in the affirmative. The Cause now came on to be heard, for further directions on the Equity reserved. The following passages in Letters written by Wilkinson to Rowe before the granting of the Lease, but after the latter had taken possession of the piece of Ground in question under an Agreement with Lord Mount Edgcumbe, and

had begun to dig a Shaft in it, were set forth in *Rowe's Answer*. "19th October 1811,—I am much pleased to hear you are likely to find a bed of Mine upon your new Set; I conclude in the Shaft you had begun to work when I was upon the Premises. I sincerely hope it will prove fortunate in the extreme."—"5th of January 1812,—I received your's last night, and, since you have left this place, I have received a Letter from Captain *Clemens*, saying he had made application to Mr. *Coode* for the Deeds of *Wheal Regent Mine*. He tells me they are done, but must be sent to be signed by the Earl of *Mount Edgecumbe*, and then they will be sent to *Newcastle*."

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Rowe having afterwards written to *Wilkinson* to give him directions as to the working of the Mine, received an Answer from him as follows: "9th January 1812,—I received your's this night, and I shall, of course, pay strict attention to it in every respect you may depend."

Mr. *Agar*, Mr. *Rose*, and Mr. *Matthews*, for the Plaintiffs:—

The declaration of Trust, as it was executed after the Bankruptcy, is nugatory; for it is quite clear, from the principles of the Bankrupt Laws, that, after an act of Bankruptcy, the Bankrupt is incapable of transferring his Property. No act of his, done after the act of Bankruptcy, can affect his Assignees. The Commission has relation to the act of Bankruptcy, and avoids every subsequent transfer of Property. The Lease passed to the Assignees, as it was in the order and disposition of the Bankrupt at the time of his Bankruptcy. It was not a Chattel Real, but a Licence (*a*). If, instead of executing

(a) *Doe v. Wood*, 2 B. & A. 724.

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a declaration of Trust, the Bankrupt had executed an Assignment, the Assignees might have defeated it. Then, can it be argued that a Bankrupt may do by a declaration of Trust what he could not have done by an Assignment? If a clear Trust exists at the time of a Bankruptcy, the *Cestui que* Trust must call on the Assignees, not on the Bankrupt, to execute it. Is there any Case in which a Bankrupt has been ordered to indorse a Bill of Exchange delivered before his Bankruptcy? In all Cases the Assignees are required to indorse it. *Smith v. Pickering* (b). *Ex parte Mowbray* (c). If a Bankrupt has contracted to sell an Estate, his Assignees are the parties who are to convey it to the Purchaser. All the Cases on the subject have decided that, if a Bankrupt before his Bankruptcy has agreed to give another Person a right to a Ship, but has not complied with the Requisitions of the Register Acts, no claim can be made by that Person to the Ship after the Bankruptcy.

The Solicitor-General, Mr. Montagu, Mr. Pepys, and Mr. Knight, for the Defendant Rowe:—

The language used by the Legislature, in the fourth Section of the Statute of Frauds, is very different from that in the seventh. By the former, the Agreement itself is required to be in writing; the latter merely enacts that all declarations of Trust shall be *manifested and proved* by some writing signed by the Party, who is enabled by Law to declare such Trust (d). It is not required that a Trust shall be *created*, but merely that it should be *proved* by writing. *Forster v. Hale* (e). Before

(b) Peake N. P. C. 50. (c) 1 J. & W. 428.

(d) 29 Car. 2. c. 3. s. 4 & 7; and see *Wain and Warlters*, 5 East, 10.

(e) 3 Ves. 696, and 5. 308; and see Roberts on Frauds, 101.

the Statute of Frauds, the Trustee might have been called upon to prove the Trust. That Statute does not deprive a Trustee of the power of declaring the Truth. *Ambrose v. Ambrose* (f). *Dawson v. Ellis* (g). It only requires that that shall be done in writing which might before have been done by parol. Nor does the Statute fix any time beyond which a Trust cannot be declared: it may be evidenced in writing at any time after its creation. If the Bankrupt, upon his examination, had denied the Trust, he might afterwards have declared it by his Will. Now it has been established by the finding of the Jury, that the Lease was taken for *Rowe's* benefit, and that *Wilkinson's* Name was used in Trust for *Rowe* at the time of the Bankruptcy; therefore *Rowe* had a right to call on *Wilkinson* to execute a declaration of Trust in his favour. The question then is, did *Wilkinson's* Bankruptcy prevent him from declaring the Trust? There is no Case in which that has been decided. An Executor or Administrator is not divested of his fiduciary character by becoming a Bankrupt; then why should a Trustee? The Bankrupt Laws do not incapacitate a Trustee from doing an act which he is called upon to do in that character; they only prevent him from disposing of his own Property. Wherever an act done by him is merely evidence of a prior right, or the completion of an act, the Court will not defeat it. *Awdley v. Halsey* (h). *Dixon v. Ewart* (i). This distinction is recognized in *Moss v. Charnock* (k). It is settled, that a Bankrupt cannot execute a Power to the prejudice of his Assignees, *Doe v. Britain* (l). But if he had parted with all his Interest in the Estate before his Bankruptcy, he might have given

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(f) 1 P. W. 321.

(h) Sir Wm. Jones, 202.

(k) 2 East, 399.

(g) 1 J. & W. 524.

(i) Buck. 94.

(l) 2 B. & A. 93.

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evidence to that effect; and he may, in other instances, give evidence to the prejudice of his Assignees; such as to show priority to the act of Bankruptcy, or that the Property was in his possession as Factor, Executor or Administrator. So he may indorse a Bill of Lading after his Bankruptcy; not if it was a new transaction; but if he had previously stipulated so to do. *Lempriere v. Pasley (m)*. He may also indorse a Bill of Exchange, and cause a Bargain and Sale of Lands, sold before the Bankruptcy, to be enrolled after the Bankruptcy. *Wilkinson*, therefore, by executing this declaration of Trust, has merely done an act of duty, which this Court will not suffer those who claim under him to repudiate.

It has been attempted to draw a distinction between such rights as could, and such as could not be enforced. But, unless it is established that the Assignee of a Bankrupt has all the privileges of a Purchaser for valuable consideration without notice, there is no ground for this distinction. The Assignee of a Bankrupt is not a Purchaser for valuable consideration without notice. If the right exists, can it make any difference whether it is or is not capable of being enforced? If a Ship at Sea is sold before the Bankruptcy, and it arrives after the Bankruptcy, no Court can enforce the Endorsement on the Certificate of Registry within ten days after the arrival of the Ship; but the Bankrupt may make it. *Mestaer v. Gillespie (n)*, and *Palmer v. Moron (o)*. Here *Rowe* advanced all the Money for working the Mine. *Wilkinson* suffered *Rowe* to go on in exercise of his right, and corresponded with, and treated him throughout as the Owner of the Mine. Under these circumstances this Court will not hear *Wilkinson*, or any

(m) 2 T. R. 485. (n) 11 Ves. 637. (o) 2 M. & S. 43.

Person claiming under him, say that the Lease is his. *Norway v. Rowe* (p). By allowing such a claim to prevail, the Court would permit the Statute of Frauds to be used for the purposes of Fraud. The principle upon which the Cases as to part-performance have been decided, ought to be applied to the present Case. Should, however, the Court be of opinion that the declaration of Trust executed by the Bankrupt after his Bankruptcy, did not prevent the Lease from passing to the Assignees, then we submit that the Letters are a sufficient declaration of the Trust in writing.

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The VICE-CHANCELLOR :—

On the 1st of January 1812, the Earl of *Mount Edgecumbe*, by Indenture of that date, granted to the Bankrupt *George Wilkinson* the Lease or Set of a certain Mine, called the *Wheal Regent Mine*, for a term of twenty-one years, for the Considerations therein mentioned; and, by an Indenture bearing date the 23d August 1813, the Bankrupt *George Wilkinson*, who, at the request of *Rowe*, had previously assigned five fourteenths to one *Brodrick*, after reciting that his Name was used in the said Indenture of the 1st January 1812 as a Trustee for *Joshua Rowe*, assigned and transferred the remaining fifty-nine Parts or Shares to the said *J. Rowe*, for the residue of the said Term. It is admitted that, prior to this Assignment, an act of Bankruptcy had been committed by the said *George Wilkinson*, and that a Commission of Bankrupt was duly issued against him in the month of November 1813; and the present Bill is filed by the Assignees of *Wilkinson* under that Commission against *J. Rowe*, and certain other Persons claiming Interest under him in the

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Wheal Regent Mine, for the purpose of having it declared that the Lease of the *Wheal Regent Mine* is the property of the Bankrupt. On the hearing of this Cause the Plaintiffs contended that it was established, by the Evidence in the Cause, that, at the time of the grant from Lord *Mount Edgumbe*, it was the purpose of the Bankrupt and *J. Rowe*, that the Bankrupt should hold the Lease for his own benefit, and not as a Trustee for *J. Rowe*; and the Plaintiffs further contended, as a point of Law, that if in fact it had been the purpose of the Bankrupt and *J. Rowe*, at the time of the grant from Lord *Mount Edgumbe*, that the Name of the Bankrupt should be used as a Trustee for *J. Rowe*, yet that such Trust could not prevail, because there was no written declaration of Trust within the Statute of Frauds other than the Indenture of 24th August 1813, which, being executed by the Bankrupt after his Bankruptcy, could not operate to defeat the claim of his Assignees.

It appeared to me, at the hearing, that I could not properly enter upon the consideration of this point of law, without first coming to a conclusion upon the fact, whether the name of the Bankrupt was or not used in the Indenture of January 1812 as a Trustee for the Defendant *J. Rowe*, and I directed an Issue accordingly. At the Trial of this Issue, the Jury found that the Name of the Bankrupt was used as a Trustee for *J. Rowe*; and a Motion having been made before me by the Plaintiffs for a new Trial of that Issue, I refused to disturb the Verdict.

The question which has now been mainly argued before me is, whether the Indenture of the 24th

August 1813, having been executed by the Bankrupt subsequent to his Bankruptcy, can or not be received as against his Assignees as a declaration of Trust in writing. Upon a consideration of the several Cases which have been referred to in the Argument, it does not appear to me that any Authority has been produced which is directly in point. All the Cases establish that a Bankrupt cannot, by any act subsequent to his Bankruptcy, transfer any Interest from his Assignees. Thus, a Bankrupt cannot defeat the Interest of his Assignees by a power of appointment. Can the Bankrupt be said to have any Interest in this Mine at the time of his Bankruptcy? He might have recovered possession of this Mine by force of his legal Title; but he would then have recovered, not in respect of his Interest, but by converting a Statute, made for the prevention of Fraud, into an instrument of his own Fraud. It is not disputed that this Deed of August 1813 would have prevailed against the Assignees, as a declaration of Trust, if it had been executed before the Bankruptcy. Yet a mere voluntary Deed, executed before the Bankruptcy, will not prevail against the Assignees. This Deed, therefore, in respect to the moral obligation on the Trustee to give effect to his Trust, would not, in such case, have been considered as a mere voluntary Deed. If, in respect of the moral obligation affecting the Trustee, this declaration of Trust would have prevailed against the Assignees if executed the day before the Bankruptcy, without any other consideration, I cannot find a principle why it should not prevail against the Assignees, if executed the day after the Bankruptcy, especially when it is considered that a Trust does not pass by Assignment in the Bankruptcy. For these reasons, I am of opinion that the Indenture of 24th

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August 1813, though executed after the Bankruptcy, is a good declaration of Trust in favour of *J. Rowe*, within the Statute of Frauds. It has been slightly argued that the Letters of the Bankrupt do manifest a Trust in writing within the Statute of Frauds; and further, that a Trust in this Case is to be implied from the fact that *Rowe* actually directed the working of the Mine, and paid the Expenses of it; but I do not think it necessary to give any opinion on these points. The Bill must therefore be dismissed, and with Costs.

11th July.

FOWLER v. WILLOUGHBY.

*Demonstrative
 Legacy.*

A pecuniary Legacy, directed to be paid by the sale of an Estate, which the Testator had contracted to purchase, is payable out of the Testator's general Assets, if the Contract cannot be completed.

IN July 1803, two Gentlemen, of the Name of *Franklin*, contracted with Lord *Brownlow* and Mr. *Sibthorpe*, for the purchase of certain Real Estates, their joint Property, for the sum of 20,000*l*.

After entering into this Contract, Messrs. *Franklin* agreed to sell various Portions of the Estates to other Individuals; and, amongst others, by an Agreement, dated in March 1804, they agreed to sell one Portion to *Thomas Willoughby*, the Testator, mentioned in the pleadings. Lord *Brownlow* and Mr. *Sibthorpe* agreed, as to the Portion purchased by the Testator, to execute Conveyances to him, which were to be delivered as escrows. Part of the Purchase-money was paid by the Testator, and he was let into Possession.

In 1805, Lord *Brownlow*, having been informed that Messrs. *Franklin* were unable to complete their Contract,

directed the Seals to be cut off the Conveyances to the Testator; and the Contract was considered at an end.

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Messrs. *Franklin*, however, after this, filed a Bill against Lord *Brownlow* and Mr. *Sibthorpe*, for a specific performance of the Agreement. But, it appearing, at the hearing of the Cause in 1808, that a Commission of Bankrupt had issued against them, though it had not been prosecuted, the Bill was dismissed by the Decree.

In 1805, pending the Suit, the Testator died. By his Will he gave to Trustees a sum of 1,400*l.*, to be raised by the sale of the Estate in question, describing it as the Estate which he had lately purchased of Mr. *Thomas A. Franklin*, upon trust to place the 1,400*l.* out upon good Security; and, out of the Interest thence arising, to maintain and educate his Grandson, *John Fowler*, until he should attain the age of twenty-one years; and, when he should attain that age, he willed that his Grandson should receive 800*l.* as his Share of the 1,400*l.*: And he gave to his Grandson, *Thomas Fowler*, when he should attain the age of twenty-one years, the remaining sum of 600*l.*, and all the Interest and Profits which should have arisen from the 1,400*l.* over and above the maintenance and education of his Grandson *John Fowler*; and he gave all the residue of his Personal Estate to his Son *Thomas Willoughby*, whom he appointed sole Executor of his Will.

In 1810, the Father of *John* and *Thomas Fowler* (who were then Infants) filed a Bill on their behalf, claiming the 1,400*l.*, against *Thomas Willoughby*, who insisted that, as the purchase of the Estate out of which the Money was to be raised had not been completed, the

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1,400*l.* was not due. But an Agreement was entered into between the Father and *Thomas Willoughby*, by which 200*l.* was paid to the Father, on behalf of the Infants, in satisfaction of all their Claims.

The Father afterwards became insolvent; and *John Fowler*, having come of age, joined with his Brother, who was then an Infant, in filing this Bill against *Thomas Willoughby* and the Trustees.

When the Cause came on to be heard, it was referred to the *Master* to inquire whether the Contract of the Testator for the purchase of the Estate could be enforced against his Assets.—The *Master* reported in the affirmative, and the Defendants took an exception to the Report, which exception the Court allowed, holding that the Contract could not be enforced.

The Cause now came on for further Directions; and the question was, whether the Legacy to *John Fowler* could take effect, although it could not be raised in the manner directed by the Testator.

Mr. *Agar*, and Mr. *Duckworth*, for the Plaintiffs :—

The doctrine laid down in *Savile v. Blackett* (a) is quite applicable to this Case. Here is a Gift of a sum of Money, and a particular Fund mentioned out of which the Testator desires the Legacy to be paid; but Lord *Macclesfield* held that, in such a Case, the failure of the Fund or Modus mentioned by the Testator is no reason why the substantive Gift of the Legacy should fail. *Whittaker v. Whittaker* (b) is to the same effect; for it

(a) 1 P. W. 777.

(b) 4 Bro. C. C. 31.

was held that a Contract, for the purchase of an Estate which the Testator devised to his Nephew, failing, the Amount agreed to be paid for it should be laid out in the purchase of other Lands, for the benefit of the Devisee. Lord Eldon has recognized the same Doctrine in *Broome v. Monck* (c).

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Mr. Horne, and Mr. Meggison, for the Defendant Willoughby.

This is not a general Legacy, but is so far specific as to depend entirely on the Fund out of which the Testator directs it to be paid. *Page v. Leapingwell* (d) proves that the Gift of a certain sum of Money, to be raised by the sale of an Estate, is a specific Legacy.—*Whittaker v. Whittaker* has no application to this Case. The question there was entirely upon the Will, and there was a clear intention to give an Estate of a particular value to the object of the Testator's Bounty. The general intention of the Testator was answered by laying out the Sum which he mentioned in the purchase of any Estate; and the Testator directed his Trustees and Executors to take that Sum out of his general Assets, and apply it in the purchase of the Estate. But in this Case there is no direction to raise a single Shilling for the Purchase. No directions are given as to what should be done in case the Contract was not completed. It is *casus omissus* by the Testator, and what happens to Legatees every day, who lose the Bounty intended for them, either by the want of Funds, or by the failure of the event on which the Gift was made to depend. There being nothing in the Will which can make

(c) 10 Ves. 597.

(d) 18 Ves. 463.

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this 1,400*l.* a Charge upon the general Assets, it must fail.

Mr. *Parker*, for another Defendant.

The *Vice-Chancellor* decreed the Legacy to be paid out of the Testator's general Estate, stating, that this was neither a *legatum nominis*, nor a *legatum debiti*, but a pecuniary Legacy with a particular Security, which in the Civil Law was termed a Demonstrative Legacy, and that our Law followed the Civil Law in giving effect to such a Legacy, where the particular Security intended by the Testator happened to fail.

18th June.
12th July.

SMITH v. COWDERY.

Will.
Condition in
Restraint of
Marriage.

Bequest to *M.* on the day of her Marriage with any other person than *T.*, and if she married *T.* then over. *M.* married *T.* in the lifetime, and with the consent of the Testator: Held that she was entitled to her Legacy.

WILLIAM YOUNG, by his Will, dated the 29th of May 1792, after giving several Legacies, gave all the rest, residue and remainder of his Monies, Securities for Money, Stock upon his Farms, Goods, Chattels, Real, Personal Estate and Effects, unto his Executors, upon trust to pay and divide the same unto and amongst his Children, *Susannah*, the Wife of *James Neeld*, *Mary Young*, *Ann Young*, *Fanny Young*, and *William Young*, equally between them, share and share alike, when they should respectively attain the age of Twenty-one Years, or day of Marriage, whichever should first happen, and the Interest thereof respectively, or so much as might be necessary, to be, in the mean time, applied towards their Support and Maintenance, except

Mary Young, whose share of the residue of his Personal Estate and Effects the Testator directed should be paid her upon the day of her intermarriage with any other person excepting *Henry Twynam*, and the Interest thereof, in the mean time, to be applied towards her Support and Maintenance: And his will and mind was that, in case *Mary Young* should at any time thereafter intermarry with *Henry Twynam*, then upon trust to pay and divide her share of the residue of his Personal Estate, so given and bequeathed to her as aforesaid, unto and amongst *Susannah Neeld*, *Ann Young*, *Fanny Young*, and *William Young*, in such manner as before and after directed concerning the residue of his Personal Estate: And it was also his will and intention that, in case *Susannah Neeld* should not leave any Issue at the time of her decease, then his Executors should place out at Interest the whole of her share of the residue of his Estate and Effects, and pay the Interest and proceeds thereof to *James Neeld* and *Susannah Neeld* for their natural Lives, and the Life of the longest liver of them; but in case *Susannah Neeld* should, at any time after his decease, have Issue, then that his Executors should pay and deliver unto her, her share of the residue of his Personal Estate and Effects; and, after the decease of the Survivor of *James Neeld* and *Susannah Neeld* (she dying without Issue as aforesaid), then that they should pay and divide her share of the residue of his Estate and Effects unto and amongst *Mary Young*, *Ann Young*, *Fanny Young*, and *William Young*, in like manner as the residue of his Personal Estate was thereinbefore and thereafter directed to be paid and divided: and, in case any or either of them, *Susannah Neeld*, *Mary Young*, *Ann*

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Young, Fanny Young, and William Young, should happen to die without Issue lawfully begotten, before his her or their respective Legacy or Legacies, Share or Shares, should become due and payable, then that his Executors should pay and divide the Legacy and Legacies, Share and Shares of him, her or them so dying, unto and amongst the Survivors of *Susannah Neeld* (in case she should have any Issue as aforesaid), but if not, he directed the Interest of her Share of the Part or Parts, Share or Shares of him, her or them so dying, to be paid to *James Neeld* and *Susannah Neeld*, for their natural Lives, and the Life of the longest liver of them, and the Principal thereof, in such manner as her Share of the residue of his Personal Estate and Effects was before directed, to *Mary Young*, in case she should not at any time thereafter intermarry with *Henry Twynam*, *Ann Young*, *Fanny Young* and *William Young*, in equal proportions, Share and Share alike, and if but one, then the whole to such Survivor: but in case any of them should die before his, her or their Legacy or Legacies, Share or Shares should become due and payable, leaving Issue lawfully begotten, then that his Executors should pay and divide the Legacy or Legacies, Share or Shares of him her or them so dying, unto and amongst the Children of him, her or them so dying, equally between them, Share and Share alike, and if but one, then the whole to such only child.

On the 1st of June 1795, the Testator died. After the date of the Will, but in the Testator's lifetime, and with his Consent, *Mary Young* married *Henry Twynam*: and the only question in the Cause was, whether she thereby forfeited her share of the Testator's residuary Estate.

Mr. Agar, Mr. Horne, Mr. Romilly, Mr. Ching,
and Mr. Jacob, for the Parties who were inter-
ested in contending for the Forfeiture:—

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Upon the plain construction of this Will, it is clear that Mrs. *Twynam* cannot be entitled to any share of the Residue. There is a condition annexed, in express terms, to the Bequest to her; and it cannot be disputed that the terms of the condition apply as well to a Marriage in the Testator's lifetime, as to one after his death. The time of payment cannot arrive; for, unless Mrs. *Twynam* married with some other person than *Henry Twynam*, she was not to be paid her Share. A Will cannot be altered by matter *in pais*. The Consent given by the Testator cannot have the effect of striking out a Clause in the Will, and inserting another in lieu of it. No matter *dehors* the Will can introduce a new Bequest, or strike out an express Gift in the Will. A Will cannot be revoked, otherwise than by writing, unless by some act which changes the nature of the Testator's interest in the substance of the Gift, such as his Marriage, and the birth of a Child.

Mr. *Sugden*, and Mr. *Treslove*, for Mr. and Mrs. *Twynam*.

The Court has struggled, in similar cases, to hold the condition dispensed with, where the Marriage was had with the Father's Consent. *Clerke v. Berkeley* (a), *Crommelin v. Crommelin* (b). There the Lord Chancellor says: "Her claim would have been upon the ground that all these Provisions were upon the supposition that they were unmarried, and in order to provide suitable

(a) 8 Vin. Ab. 154. S. C. 2 Vernon, 720. (b) 3 Ves. 227.

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Marriages for them. Her claim would have been that she had married, and that the consent of the Trustees was quite impossible then; for there were then no such Trustees in existence." *Parnell v. Lyon* (c) is exactly this Case; for it contains an express Gift over in case the Daughters married without the consent of the Executors. *Coffin v. Cooper* (d). In the present case no Consent is required; but there is a Gift over in case *Mary Young* married Mr. *Twynam*. But when the Testator did away with the prohibition, and consented to and assisted in completing the act which it is contended worked a Forfeiture, he impliedly revoked the Clause. The Condition is considered as ceasing when the Testator has done an act which virtually strikes the Clause out of the Will. He was looking to a Marriage after his death; and, therefore, the provisions of his Will cannot be applied to one solemnized in his lifetime. *Wheeler v. Warner* (e).

The Court is authorized to hold a Will to be revoked by circumstances extrinsic to the Will; because its decisions with respect to Legacies are regulated by the Civil Law, and the Civil Law holds that such circumstances may effect a Revocation. Upon this principle it has been decided that Marriage and the Birth of a Child are sufficient to revoke a Bequest. The earliest Case in which this was decided was *Lugg v. Lugg* (f). There the Delegates held that, there being such an alteration in the Testator's Estate, and circumstances so different at the time of his death from what they were when he made the Will, there was room and presumptive

(c) 1 V. & B. 479.

(d) Cited in last Case.

(e) *Ante*, 1st Vol. 304.

(f) 2 Salk. 592. S. C. 1 Ld. Ray. 441.

Evidence to believe a Revocation, and that the Testator continued not in the same mind. In *Doe v. Lancashire (g)*, Lord *Kenyon*, C. J., states the foundation of the principle to be, not so much an intention to alter the Will, implied from those circumstances happening afterwards, as a tacit condition, annexed to the Will itself at the time of making it, that the party does not then intend that it should take effect, if there should be a total change in the situation of his Family. Here the Testator, at the time of making his Will, opposed the Marriage: but afterwards altered his mind and promoted it. It is no violation of the expressions of the Will to hold *Mrs. Twynam* entitled to a share of the Residue; for the Testator gives it over in case she should at any time *thereafter* intermarry with *Henry Twynam*. Now the Will speaks at the Death of the Testator, and the Marriage took place before that event, therefore the Gift over could not take effect.

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Mr. *Heald*, and Mr. *Roupell*, for other Parties.

The VICE-CHANCELLOR:—

The Testator in this Case introduces a Condition in his Will to prevent the Marriage of his Daughter *Mary* with *Henry Twynam*. After the making of his Will his Daughter *Mary* married *Henry Twynam*, with his express consent and approbation; and the Condition is thus dispensed with. In coming to this conclusion, I follow the Cases of *Clerke v. Berkeley*, *Crommelin v. Crommelin*, and *Parnell v. Lyon*. In this Case it is very questionable, whether, under the language of the Will,

(g) 5 T. R. 49. See also *Brady v. Cubitt*, Doug. 30.

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the Share of the Testator's Daughter *Mary* did not vest absolutely at Twenty-one, without regard to Marriage; but it is not necessary to pursue that point.

1st. and 12th
July.

WIGSELL v. WIGSELL.

Tenant in Tail.

Tenant in Tail in remainder (after Estates to *A.* for Life, and to his first and other Sons in Tail) pays off a Mortgage during the Life of the Tenant for Life, takes an Assignment to himself of the Mortgage Term, and afterwards comes into Possession of the Estate, and dies without Issue: the Mortgage is a subsisting Charge for the benefit of his Personal Estate, there being no act to show a contrary intention.

IN the year 1773, *Thomas Wigsell*, being seised in Fee-simple of certain Real Estates, mortgaged them for a term of 2,000 years, to secure 1,000*l.* and Interest.

By his Will, dated in 1774, he devised his Real Estates to Trustees, for a term of 500 years, upon trust to raise Money for payment of his Debts and of a sum of 1,500*l.* to *Susannah Wigsell*, on her Marriage; and, subject thereto, he devised the Estates to *Atwood Wigsell* for his Life, with remainder to the first and other Sons of *Atwood Wigsell* in Tail; with remainder to *Thomas Wigsell*, the younger, for his Life; with remainder to his first and other Sons in Tail; with remainder to *Susannah Wigsell*, and the Heirs of her Body; with remainder to his own right Heirs.

The Testator died in 1778; and his Will was proved by *Atwood Wigsell*, the sole Executor, who entered into possession of the Real Estates, as Tenant for Life under the Will.

Atwood Wigsell made his Will in 1795, and died in the same year without Issue. *Thomas Wigsell*, the younger, his Brother, and sole Executor, proved his Will, and entered into possession of the Real Estates, as Tenant for Life.

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In 1797, *Thomas Wigsell*, the younger, being the Heir at Law of *Thomas Wigsell*, and, as such, seised of the reversion in Fee of the Real Estates, expectant on the death of himself and *Susannah Wigsell* without Issue, concurred with *Susannah Wigsell* in executing a Settlement of the Real Estates on himself for Life, with remainder to his first and other Sons in Tail, with remainder to *Susannah Wigsell* in Tail, with remainder to Trustees, for a term of 5,000 years, to raise 1,000*l.* and pay it to *Susannah Wigsell*, in discharge of the like Sum due to her by *Thomas Wigsell*, the younger, on his Bond, with remainder to the Daughters of *Thomas Wigsell*, the younger, as Tenants in Common in Tail, with remainder to *Atwood Wigsell Wigsell* for Life, with remainder to the first and other Sons of *A. W. Wigsell* in Tail, with divers remainders over.

On the 3d of July 1805, during the lifetime of *Thomas Wigsell*, the younger, *Susannah Wigsell* paid off the 1,000*l.* due on the Mortgage created by *T. Wigsell*, the elder, and, by an Indenture of the same date, reciting that *Thomas Wigsell*, the younger, having been applied to by the Mortgagees, but being unable to pay the 1,000*l.* *Susannah Wigsell* had paid it at his desire, the Mortgage Term of 2,000 years was assigned to *Susannah Wigsell*.

In September 1805, *Thomas Wigsell*, the younger, died without Issue. Upon his decease his Widow, who was also his Personal Representative, entered into possession of a part of the Estates comprised in the Mortgage, which her Husband had, in the year 1795, settled on her, for her Jointure, under a Power contained in the Will of *T. Wigsell*, the elder, and *Susannah Wigsell* entered into possession of the rest of the Estates as

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Tenant in Tail, and continued in possession thereof till some time in 1806, when she died, without ever having been married. By her Will, dated in November 1805, she gave all her Personal Estate to her Executors, for the benefit of *Atwood Wigsell Wigsell*.

Upon *Susannah Wigsell's* death, *Atwood Wigsell Wigsell* entered into possession of the Estates, not comprised in the Jointure, as Tenant for Life under the Settlement of 1797; and, in 1821, he died, having, by his Will, bequeathed all his Personal Estate to the Plaintiff, his Widow.

The Bill charged that the 1,000*l.* had never been called in by *Susannah Wigsell*, and prayed that it might be declared to be a subsisting Charge upon the Estates, and that the Plaintiff was entitled to it as part of *Susannah Wigsell's* Personal Estate, which was bequeathed to her Husband.

The Widow of *Thomas Wigsell*, the younger, who was one of the Defendants, by her Answer, insisted that the term of 2,000 years, assigned to *Susannah Wigsell*, had merged in the Inheritance, which had become vested in her in Possession; and that *Susannah Wigsell* had never, after the death of *Thomas Wigsell*, the younger, made any claim upon the Defendant, in respect of the Interest of the 1,000*l.*, which had been charged upon part of her Jointure Lands, although a full settlement of all Accounts between them had been made; nor did her Executors ever make any such claim until a short time before the Bill was filed; and that *Susannah Wigsell* was not only Tenant in Tail, but, under the Settlement of 1797, had an absolute

power over the whole Fee-simple, by means of a power of Revocation and new Appointment, which she had, in fact, exercised, by altering certain of the limitations in that Settlement, on failure of the Issue of *Atwood Wigsell Wigsell*.

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The Cause now came on to be heard.

Mr. *Roupell*, and Mr. *R. Roupell*, for the Plaintiff:—

There could be no merger in this Case, on account of the term of 500 years, which intervened between the Mortgage Term and the limitation of the Inheritance to *Susannah Wigsell*. In cases of this kind the Court always looks to the intention. *Forbes v. Moffatt* (a) establishes the Rule, not only that the intention of the party must govern, but that the advantage of the Personal Representative is to weigh with the Court. *Thomas v. Kemish* (b) is to the same effect.

Mr. *Sugden*, and Mr. *Pemberton*, for the Widow of *Thomas Wigsell*, the younger:—

In order to judge of the intention in this Case, the Court must consider the situation of the Parties. If it makes no difference whether the Estate or the Charge first vests, it is difficult to see how it can be made out that this Charge subsisted after the Inheritance became vested in *Susannah Wigsell*. The situation in which she stood at the time when the Term was assigned to her, was such as made it clearly for her interest to keep the Charge alive during the lifetime of *Thomas Wigsell*, the younger, who was then Tenant for

(a) 18 Ves. 384.

(b) 2 Vern. 348.

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Life of the Estates. If she had not done so, she would have lost the Interest of the 1,000*l.* during the subsistence of his Life Estate. But, from the moment when the Inheritance became vested in her, it became a matter of indifference whether the Term was kept alive or not. She had concurred with *Thomas Wigsell*, the younger, in making a settlement of the Estate on *Atwood Wigsell Wigsell*; and that Settlement was made, reserving a power of revocation to *Susannah Wigsell*. Was it then a probable intention on her part that the Personal Representative should diminish the Estate by raising the amount of this Charge out of it? In *Thomas v. Kemish* the Tenant in Tail died an Infant, in which case the rule of the Court always is, to consider that the Infant intended to keep the Charge alive.

Mr. Roupell, in reply :—

Susannah Wigsell, though she was Tenant in Tail, never suffered any Recovery; and, not having done so, it is clear that she did not intend to make the Estate her own. There is as much evidence of intention in this Case, as in those in which the Court has held that the Charge was not in Equity extinguished. *Duke of Chandos v. Talbot* (c), *Wyndham v. Lord Egremont* (d).

Mr. Longley, and Mr. Daniell, for other Defendants.

The VICE-CHANCELLOR :—

This Bill is filed for the purpose of having it declared that the Plaintiff, as representing *A. W. Wigsell*, deceased, is entitled to have a sum of 1,000*l.* and

(c) 2 P. W. 601.

(d) Amb. 753.

Interest raised by Sale or Mortgage of the Estate in question in this Cause.

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WIGSELL.

Susannah Wigsell, being Tenant in Tail in remainder of this Estate, expectant upon the Death of her Brother, *Thomas Wigsell*, and failure of his Issue, during the Life of *Thomas Wigsell*, paid off an old Mortgage of 1,000*l.* due upon this Estate, and took an Assignment of the Mortgage Term to herself. *Thomas Wigsell* afterwards died without Issue, and *Susannah* became Tenant in Tail in possession, and afterwards died without Issue, and without having suffered a Recovery; and the Question is, whether the Mortgage of 1,000*l.*, which she so paid off, did not, at her Death, constitute part of her Personal Estate.

Where a Tenant in Tail in possession pays off a Mortgage, and declares no intention that the Charge shall continue for the benefit of the Personal Estate, there the Charge ceases; because the Estate is considered as his own, inasmuch as he may make it his own by suffering a Recovery. This principle has no application to a Tenant in Tail in remainder whose Estate may be altogether defeated by the Birth of Issue of another person; and it must be inferred that such a Tenant in Tail means to keep the Charge alive.

When *Susannah Wigsell*, therefore, became Tenant in Tail in possession, this Charge subsisted as a part of her Personal Estate; and, not having afterwards declared any intention to the contrary, I am of opinion that it continued part of her Personal Estate at her Death, and that the Plaintiff is entitled to the Relief which she prays.

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This Case has been partly argued on the ground of Merger; but Merger is out of the question here, because of the intermediate Estate (e).

18th July.

Practice.
Injunction.

Special Injunction granted to stay Proceedings in an Action in the Court of Common Pleas at Lancaster.

HINE v. FIDDES.

THIS was a Motion for a Special Injunction, to restrain the Proceedings in an Action brought by the Defendant against the Plaintiff, in the Court of Common Pleas at Lancaster. The Bill was filed on the 11th instant. The Affidavit in support of the Motion verified the Contents of the Bill, and stated, amongst other things, that, on or about the 25th of June last, the Plaintiff had been arrested, by virtue of a Writ of *Capias*, issued, at the Defendant's Suit, out of the Court in question, returnable on the 6th instant; that a Declaration had been filed in the Action, and notice of it served on the Plaintiff; and that, according to the Practice of the Court, the Plaintiff was bound to plead to the Declaration within eight Days from the filing of it; and that the Cause would stand for Trial at the Lancaster Assizes, to be held on the 15th of August next.

Mr. Koe, in support of the Motion, referred to the 39th and 40th Geo. III. c. 105, and said that, regard being had to the time at which the Action had been commenced and the Seal-days of this Court, it was impossible for the Plaintiff to obtain the common Injunction before the trial of the Action; and that no Suit could have been instituted in the Court of Chancery at Lancaster so as to stay the Proceedings. On these grounds the Vice-Chancellor granted the Injunction.

(c) See *Drinkwater v. Combe*, ante, 340.

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The Defendant had been served with Notice of the Motion, but did not appear.

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BOLTON v. BOLTON.

THE Plaintiff had filed a Bill of Revivor, but had neglected to obtain an Order to revive.

16th July.

Practice.

Mr. Koe, on behalf of the Defendant, now moved that the Plaintiff might revive the Suit within ten days, or that both the original Bill and Bill of Revivor might stand dismissed. He cited *Adamson v. Hall* (a), and *Atkis v. Wynne*, 10th August 1805; in which latter Case, the Defendant alleging that a Bill of Revivor had been filed, but no Order to revive obtained by the Plaintiff, the Court ordered that the Plaintiff should revive within a limited time, or both Bills be dismissed.

A Bill of Revivor having been filed, but no Order to revive obtained, the Court ordered the Plaintiff to revive within ten days, or both the original Bill and Bill of Revivor to be dismissed.

The Vice-Chancellor made the Order.

HIBBERSON v. FIELDING.

8th and 16th
July.

Practice. Costs.

THE Bill was filed for a Discovery, in aid of an Action at Law. There was only one Plaintiff. The Defendant had put in his Answer. On the 18th of June, a Commission of Bankrupt was issued against the Plaintiff, under which he was declared a Bankrupt. On the 28th of the same month, the Defendant obtained the usual Order for payment of his Costs.

An Order obtained by a Defendant to a Bill of Discovery, for payment of his Costs, is regular, although the Plaintiff had previously become Bankrupt.

(a) 1 Turn. 258.

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Mr. *Pemberton* now moved to discharge that Order, for irregularity, and contended that the Suit was, in effect, abated.

Mr. *Spence* opposed the Motion.

The *Vice-Chancellor* refused the Motion; and said that the Bankruptcy of the Plaintiff could not defeat the Defendant's right to the Order: but that it might be a question between the Bankrupt and his Assignees whether the Estate should not pay the Costs.

ELWORTHY v. BIRD.

19th June.
 26th July.

Husband and
 Wife.
 Specific
 Performance.

THE question in this Cause was, whether the Court would decree a specific performance of an Agreement for a Separation between a Husband and Wife. The Plaintiffs were the Wife and her Father and Brother.

This Court will decree specific performance of an Agreement for Separation between Husband and Wife, although the Agreement was made on a compromise of Indictments, preferred by the Wife against the Husband and others, for Assaults on her.

The Bill stated that the Marriage between the Defendant and the Plaintiff, his wife, took place in 1811; that they continued to reside together for some time; that the Defendant, without any provocation, had treated his Wife with such harshness and cruelty, that, in the

It is not illegal to compromise Indictments for a Misdemeanor; *secus*, as to Indictments for Felony.

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month of July 1821, she was compelled to leave him, and removed to the House of her Father; that the Defendant, upon that occasion, agreed to allow her 50*l.* a year for her Maintenance, and gave directions to his Attorney to prepare an Agreement in writing for that purpose; that the Attorney, accordingly, prepared a draft of such Agreement, but that it was never engrossed, and the Defendant afterwards refused to pay the Annuity, or allow his Wife any Sum for her support, whereby she was reduced to great distress; that, in February 1822, she returned to her Husband, who treated her with increased cruelty, confined her in a dark and unwholesome room, and not only beat her himself, but caused his Workmen and Apprentices to beat and maltreat her; that, by the interference of the Plaintiffs, (her Father and Brother,) an Order was obtained from a Magistrate for releasing her from confinement, and the Defendant was bound over to keep the peace towards her, and Indictments were preferred against him and his Workmen and Apprentices for the Assaults committed by them upon her; that the Indictments stood for trial at the General Quarter Sessions in July 1822; that the Indictment against the Defendant was first tried, and, the Case being fully proved against him, he was found Guilty; that, upon the verdict being returned, the Justices expressed their opinion that, under the circumstances, it would be best that the Disputes and Differences between the Parties should, in some manner, be accommodated; that, in consequence of this recommendation, a conversation took place, between the Counsel and Attorney of the Plaintiffs and the Counsel and Attorney of the Defendant, with the view of effecting an arrangement, and, in a short time, with the authority and consent of the Plaintiffs and the Defendant, they came to an Agreement,

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which was reduced into writing and signed by the Counsel on each side, on behalf of their Clients, and was as follows :—

“ *Rex* against *William Bird*.

“ Upon a verdict of Guilty in this Case, a nominal Fine was, by consent of the Prosecutrix, imposed on the Defendant, 1822, July 18th, it being agreed that a Deed of Separation shall be executed by Mr. and Mrs. *Bird* and *Thomas Elworthy*, the Father of Mrs. *Bird*, and *William Elworthy*, her Brother, who shall be Trustees on her behalf, by which 50 *l.* a year, for her life, payable quarterly by said Mr. *Bird*, shall be sufficiently secured to Mrs. *Bird*, to commence 1st day of January 1821, the Arrears of which to be paid by the said Mr. *Bird*, and also Covenants from *Thomas Elworthy*, the Father of Mrs. *Bird*, and *William Elworthy*, the Brother, to indemnify the said *William Bird* against the Debts of Mrs. *Bird*, and that Mr. *Bird* shall not be molested by her. All Actions and Indictments which have been brought and preferred, and which are still pending for any matter or thing done or said by Mr. and Mrs. *Bird*, or either of them, or by their respective Relations and Servants, or any or either of them, relating to or connected with the conduct either of Mr. or Mrs. *Bird*, and all Actions now pending against any other Person for criminal Conversation with Mrs. *Bird*, shall be discontinued: and that no further Actions shall be brought, or Proceedings had, for or on account of any thing done or said to or by the said Mr. and Mrs. *Bird*, or their respective Families or Servants, up to and including the date of this Agreement.”

The Bill then stated that the substance of this Agree-

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ment was communicated to the Justices, who approved of it, and, in consequence, sentenced the Defendant to pay a fine of one Shilling only, and ordered the trials of the other Indictments to be respited; that, in pursuance of the Agreement, the Plaintiffs discontinued the prosecution of the other Indictments, and the Defendants to them had in consequence been acquitted; that the Plaintiffs had, in all other respects, performed the Agreement on their parts, and had caused a draft of a Deed to be prepared pursuant to it; but that the Defendant refused to perform the Agreement, or to execute a proper Deed for securing the Annuity of 50*l.*, or to pay the Arrears of it, although the Plaintiffs had offered, upon his executing a proper Deed, to give him an indemnity against the Debts of his Wife, pursuant to the Agreement.

The Bill charged various facts, as to the conduct of the Defendant, tending to show that he had recognized the Agreement, and that it was duly signed on his behalf; that it was duly obtained from him; that the terms of it were, in all respects, fair and reasonable; that the amount of the Annuity bore only a small proportion to the amount of the Defendant's Property and Income; that the Wife would, on account of his conduct, have been entitled to a sentence of Divorce or Separation from him in the Ecclesiastical Court, but that she had not commenced any such proceedings in consequence of the Agreement; and that her Father and Brother had, some time since, commenced Actions at Law against the Defendant for non-performance of the Agreement, but not being prepared with proper Evidence had been nonsuited.

The prayer of the Bill was, for the specific performance of the Agreement for a Separation; for an account

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and payment to the Wife of the arrears of the Allowance of 50 *l.* a year, and for the execution of a proper Deed, and performance of all other necessary acts to secure the future payment of the Allowance.

The Defendant put in a general Demurrer, for want of Equity.

Mr. *Hart*, and Mr. *Richards*, for the Demurrer :—

1st. The general doctrine of the Court is not to decree the specific performance of Agreements for Separation between Husband and Wife. In the Cases where the Court has given effect to such Agreements, the Judges have uniformly shown themselves anxious to distinguish those particular Cases as exceptions from the general rule. *St. John v. St. John (a)*, *Worrall v. Jacob (b)*, *Jee v. Thurlow (c)*, *Legard v. Johnson (d)*. And in all the Cases in which any sanction has been given to Deeds of Separation between Husband and Wife, the Instrument has been under Seal. In *Binnington v. Wallis (e)*, the distinction between the effect of an Instrument under Seal, and a mere executory Agreement not under Seal, was noticed. *Durant v. Titely (f)*, and *Matthews v. L. (g)*, are Cases in which the Court refused to act upon Agreements for Separation.

2d. This Agreement was made for compounding and suppressing Indictments, and therefore cannot be sanctioned. It is contrary to the policy of the Law to give effect to an Agreement made for such a purpose. *Johnson v. Ogilby (h)*. There can be no mutuality in an Agreement made upon such a consideration; for if,

(a) 11 Vez. 537. (b) 3 Meriv. 256. (c) 2 Barn. & Cress. 547.
(d) 3 Vez. 352. (e) 4 Barn. & Ald. 650. (f) 7 Price, 577.
(g) 1 Madd. 558. (h) 3 P. W. 279.

notwithstanding the Agreement, the Indictments were afterwards prosecuted, it would be impossible to restrain the proceedings; *Lord Montague v. Dudman* (i), *Mayor of York v. Pilkington* (k); and it would remain entirely in the discretion of the *Attorney-General* whether he would grant a *nolle prosequi*; *Jones v. Clay* (l). In *Blackstone's Commentaries* (m), it is said that the practice of allowing Parties to compromise Indictments for Felonies is a dangerous practice, and ought never to be allowed in local or inferior Jurisdictions, such as the Quarter Sessions. *Collins v. Blantern* (n), *Edgecombe v. Rodd* (o).

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Mr. *Heald*, and Mr. *Jacob*, for the Bill :—

1st. It is quite established that the Court will decree the specific performance of Agreements for Separation between Husband and Wife. In *Worrall v. Jacob*, which has been cited on the other side, the *Master of the Rolls* treated it as quite settled that the Court would enforce such Agreements. In *Fletcher v. Fletcher* (p) the same doctrine is laid down. But the present Case is much stronger, because it is one where the Husband and Wife are already in a state of actual Separation, and were separated at the time when the Agreement was made. It makes no difference whether the Instrument which contains the Agreement be under Seal or not. In *Angier v. Angier* (q), it does not appear that the Agreement was under Seal, and it would seem from some expressions in the Report that it was not under Seal. *Seeling v. Crawley* (r) was also a Case where there were mere Articles of Agreement. *Freeman*

(i) 2 Vez. 396. (k) 2 Atk. 302. (l) 1 Bos. & Pull. 191.
(m) 4th Vol. 363. (n) 2 Wils. 347. (o) 5 East, 294.
(p) 2 Cox, 99. (q) Pre. Cha. 496. (r) 2 Vern. 385.

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v. *More* (s) is also a strong Case. In *Head v. Head* (t), where Lord *Hardwicke* treated it as the usual practice of the Court to enforce Agreements of this kind, it is material to observe that the way in which that Case was argued on behalf of the Husband, was, that it was an Agreement only for Separation during pleasure, and therefore that the Court could not establish it against the Husband, and that Lord *Hardwicke's* Judgment proceeded upon that view of the Case. *Yeo v. Yeo* (u) is a strong instance of the countenance given by this Court to Suits for the performance of Articles of Separation. *Lambert v. Lambert* (v) is also a strong authority. In *Bateman v. Ross* (w) one of the objections was, that the Agreement was between Husband and Wife, and therefore *nudum pactum*; but Lord *Redesdale* and Lord *Eldon* both seemed to entertain no doubt on that question, and affirmed the Judgment. And in *Tovey v. Lindsay* (x), a Separation by Deed was held, by the House of Lords, to have the effect of changing the Domicil of the Wife. In *Cooke v. Wiggins* (y), the Trustees under a Bond for separate Maintenance, declining to sue the Husband, this Court made a Decree for the Payment. In *Worrall v. Jacob*, unless Sir *Wm. Grant* had felt satisfied that there was a sufficient consideration, he would not have decreed a specific Performance; for it is settled that the Court will not decree specific performance of a mere voluntary Agreement; *Sutton v. Chetwynd* (z). In *Scholey v. Goodman* (a), no objection [was taken as to want of sufficient consideration. In the present Case there is a better consideration to support the Agreement than is

(s) 1 Bro. P. C. 237. (t) 3 Atk. 295-547. (u) 2 Dick. 498.
 (v) 2 Bro. P. C. 18. (w) 1 Dow. 235. (x) 1 Dow. 131.
 (y) 10 Ves. 191. (z) 3 Meriv. 249. (a) 1 Bing. 349.

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to be found in most cases of this description; for it appears that the Defendant has used his Wife in such a way as to subject him to Indictments, and to proceedings in the Ecclesiastical Court for Alimony. In *Hobbs v. Hull* (b), that was held to be a sufficient consideration to support the Allowance for separate Maintenance against the Husband's Creditors; and the same thing was decided in *Nunn v. Wilsmore* (c). *Guth v. Guth* (d) is a Case in which specific performance of such an Agreement was decreed, although the Husband, by his Answer, offered to receive back his Wife.

ad. It is no objection to the performance of this Agreement that part of the consideration was compounding the Indictments, which were for a mere private Misdemeanor. It would have been different if it had been compounding a Prosecution for Felony; or even for a public Misdemeanor. Not to prosecute a Felony is misprision of Felony, but the Law makes a distinction between public and private Misdemeanors, by allowing the latter to be compromised after Verdict and before Sentence. Many of the Rules applied to civil Proceedings are applicable to Indictments for private Misdemeanors. *Beeley v. Wingfield* (e) is an authority to show that a Sum agreed to be paid as a compromise for a private Misdemeanor, where the Compromise was made with the sanction of the Tribunal before which the Prosecution was instituted, may be recovered in an Action at Law. *Rex v. Fielding* (f), *Mayor of York v. Pilkington* (g). In *Edgewcombe v. Rodd* (h), Mr. Justice *Le Blanc* takes the distinction expressly between a public and a

(b) 1 Cox, 445. (c) 8 T. R. 521. (d) 3 Bro. C. C. 614.
(e) 11 East, 46. (f) 2 Burr. 719. (g) 2 Atk. 302.
(h) 5 East, 294.

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private Misdemeanor. In *Roy v. Duke of Beaufort* (i), a Bond was given by a Party under Prosecution for an offence against the Game Laws, and although the Bond was relieved against, on the ground of Oppression, it would seem, from what is said by Lord *Hardwicke*, that it was considered as no objection to the Bond that it was given in consideration of stopping the Prosecution. In *Elworthy v. Bird* (k), where this same Case was before the Court of Exchequer, on an Action of Assumpsit on the Agreement, the Plaintiffs were nonsuited merely because the Agreement was not proved; and Baron *Hullock*, so far from treating such an Agreement as illegal, pointed out the proper course of proceeding to make it available. In *Johnson v. Ogilby*, which has been cited on the other side, Mr. *Peere Williams* took the distinction between the compromise of a Felony and of a private Misdemeanor; and the Court seems to have adopted it, as the Bill was dismissed. *Fallowell v. Taylor* (l) is a Case in which it was held that a Bond, given in consideration of refraining from a Prosecution for a public Nuisance, was held good in Law. *Brett v. Close* (m). The Agreement in the present Case was made subject to the approbation of the Court in which the Indictments were pending. That Court was itself a Party to the Agreement. All the other Indictments were before that Court, which was constant of all the circumstances of the Case, and thought those other Indictments should not be prosecuted.

Drage v. Ibberton (n) is a Case in which it was decided that a Note given for the compromise of a Mis-

(i) 2 Atk. 190. (k) 13 Price, 222. (l) 7 T. R. 475.

(m) 16 East, 293. (n) 2 Espinasse, 643.

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demeanor may be recovered at Law ; and Lord *Kenyon* there alluded to the distinction between the compromise of Felonies and private Misdemeanors, as established by Lord *Talbot* in *Johnson v. Ogilby*. In *Kydd on Awards*, 2d edit. 66, a Case is mentioned in which there were several Indictments for Conspiracy and Perjury, and after the trial of the first Indictment Lord *Kenyon* directed an Arbitration. If that was right in a Case of Perjury, surely the Justices must have been right in directing the Compromise in the present Case. In *Baker v. Townshend* (o), it was decided, expressly, that it was legal to refer to Arbitration Indictments for Assaults. Indeed, it would be very difficult to hold that compounding Assaults was illegal, as nothing is more common than where a Party was brought before a Magistrate, for him to recommend a Compromise.

The VICE-CHANCELLOR :—

In support of this Demurrer two grounds have been taken:—First, that this Court will not carry into execution Articles of Separation between Husband and Wife: secondly, that the Agreement sought to be executed is illegal, because it provides that a nominal Fine only shall be imposed upon the Husband, who had been convicted, upon an Indictment, for an Assault upon the Wife, and because it provides also that Indictments, which had been found against the Workmen and Apprentices of the Husband for Assaults upon the Wife, should be discontinued.

As to the first ground, inasmuch as these Articles contain an engagement, on the part of the Father and the Brother of the Wife, to indemnify the Husband from the Debts of the Wife in consideration of the Husband's

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Stipulation to pay the Wife an allowance of 50*l.* a year for her Life, there can be no question that this Court will enforce that Stipulation against the Husband. And, as to the second ground, all the Authorities concur that the Policy of the Law does permit the compromise of Indictments for Assaults, and such Compromises are frequently recommended and approved by the Court, and the Bill alleges that such was the fact in the present instance.

Demurrer overruled.

29th July.

STATHAM v. HUGHES.

Practice.
Injunction.

Although an Injunction is not applied for upon an original Bill, yet, if the Bill is afterwards amended, an Injunction will be granted, as of course, upon the Defendant taking an Order for time to answer the amended Bill.

THE Bill prayed for an Injunction to stay proceedings at Law ; but no Injunction was obtained, or even applied for. After the Answer was put in, the Bill was amended. The Defendant then took an Order for time to answer the amended Bill ; upon which the Plaintiff obtained an Order for the common Injunction.

The Defendant now moved to discharge that Order, for irregularity.

The *Vice-Chancellor* directed the Motion to stand over, in order that the Practice might be inquired into ; and ultimately refused the Motion.

Mr. Koe appeared in support of the Motion.

Mr. Spence opposed it.

TANIERE v. PEARKES.

1825.
30th July.

THE question in this Case was as to the construction of the following Clause in a French Will :—

Will.
Construction.

“ Je donne ce lègs à ma sœur Francoise, épouse de Monsieur Tanier de Feu, habitant à Camarade, département de Larridge, la somme de six cents livres sterlings, une fois payée à son decès à ses deux filles, qui leur sera partagée par deux égales portions : leur époux ne pourront en jouir qu'autant que son épouse consentira ; à leur decès à leurs enfans.”

Legacy of 600 l. to F., and at her death to her two Daughters in equal Shares, and at their death to their Children ; one of the Daughters having died without Children, held that the Children of the other Daughter did not take the whole 600 l., but only their Mother's Share.

One of the Daughters of the Testatrix's sister Francoise died without Children, and the question was, whether the Children of the other Daughter took the whole 600 l. between them.

Mr. Treslove, for the Children, cited *Malcolm v. Martin* (a). *Doe v. Abey* (b).

The VICE-CHANCELLOR :—

The Case of *Malcolm v. Martin* has no application here. There the Grand-children took nothing till all the Children were dead. Here the Children of each Daughter must plainly take their Mother's Share upon her death ; and there are no words which can carry one Daughter's Share either to the surviving Daughter or her Children.

(a) 3 Bro. C. C. 50.

(b) 1 M. & S. 428.

1825.
15th July.
2d August.

*Charity.
Jurisdiction.*

PIESCHEL v. PARIS.

THIS was a Suit for the administration of the *Trusts* of the Will of *Augustus Godfrey Pieschel*.

Where a Testator gives a sum of Stock to Trustees, and shows a clear Intention to dispose of the whole of the Dividends for the benefit of charitable Institutions, and does, in fact, specify some of them, and the yearly Sums to be paid to them, but leaves Blanks for the Names of others and for the Sums to be paid to them; the Court will refer it to the Master to approve of a Scheme for the application of the remaining Dividends.

By his Will, dated the 26th of October 1820, after giving several pecuniary Legacies to a large amount, he bequeathed to the President, Treasurer and Governors of Christ's Hospital, the sum of 1,000*l.*, upon condition that they, and their Successors for the time being, for ever should distribute and pay the various annual Sums after directed by him to be paid to the various charitable and other Establishments in *England* after specified; and, in order to provide a Fund adequate to those purposes, he gave to the President, Treasurer and Governors of Christ's Hospital, 30,000*l.* Stock, then bearing an Interest of 4*l.* per cent. per ann. in the London Dock Company, commonly called London Dock Stock, upon trust, from time to time for ever thereafter, to receive and take the Interest, Dividends and annual Proceeds of the said London Dock Stock, and pay and apply the same in manner and for the purposes thereafter mentioned, that is to say, to pay, yearly and every year for ever thereafter, the sum of 100*l.*, part of the Interest, Dividends and annual Proceeds, to the Treasurer for the time being of the London Hospital, to be, from time to time, applied and disposed of for the benefit of the same Hospital.

The Will then contained similar bequests of the yearly Sums after mentioned to the following Charities:—

CASES IN CHANCERY.

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£. 100, yearly, to the Asylum for the Deaf and Dumb; 100*l.* yearly, to the School for the Indigent Blind; 100*l.* yearly, to the Middlesex Hospital; 50*l.* yearly, to the Hospital for Lying-in Women; 50*l.* yearly, to the Society for relief of Prisoners for small Debts; 50*l.* yearly, to the Society for the relief of Foreigners in Distress; 50*l.* yearly, to the City Orphan School; 100*l.* yearly, to the London Orphan School; 50*l.* yearly, to the St. George's Hanover-Square Charity School.

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The Will then proceeded in these words :—" And do
and shall, yearly and every year for ever hereafter, pay
the sum of _____ , other part of the said Interest,
Dividends and annual Proceeds, to the Treasurer for the
time being of _____ , to be by him, from time to time,
applied and disposed of for the sole use and benefit of
that Charity; and do and shall, yearly and every year
for ever hereafter, pay the sum of _____ , other part
of the said Interest, Dividends and annual Proceeds, to
the Treasurer for the time being of _____ , to be by
him, from time to time, applied and disposed of for the
sole use and benefit of that Charity; and do and shall,
yearly and every year for ever hereafter, pay the sum of
_____ , other part of the said Interest, Dividends
and annual Proceeds, to the Treasurer for the time
being of _____ , to be by him, from time to time,
applied and disposed of for the sole use and benefit
of that Charity; and do and shall yearly, and every year
for ever hereafter, pay the sum of _____ , other part
of the said Interest, Dividends and annual Proceeds, to
the Treasurer for the time being of _____ to be by
him, from time to time, applied and disposed of for the
sole use and benefit of that Charity; and do and shall,
yearly and every year for ever hereafter, pay the sum of

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200*l.*, being the residue of the said Interest, Dividends and annual Proceeds, to the Earl of *Chichester*, or to the Person or Persons who shall or may, for the time being, be Earl of *Chichester*." The Testator then directed the Earl of *Chichester*, for the time being, to apply 100*l.* yearly, part of such yearly sum of 200*l.*, for the poor Inhabitants of *Brighton*, and the remaining 100*l.* for the sole benefit of the Brighton Infirmary, and then expressed himself as follows: "And I do hereby direct that the several yearly sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, so hereinbefore directed to be paid, applied and disposed of for the benefit of the said several Charities, respectively, as aforesaid, shall, respectively, be annually paid to the respective Treasurers for the time being of such Charities, respectively, at the respective usual Anniversary Dinners of the same Charities respectively, and at which Anniversary Dinners respectively, or some of them, *William Frederick Duke of Gloucester and Edinburgh* has usually presided. But in case, in any year or years, there shall be no Anniversary Dinner or Dinners of all or any, one or more of the said several Charities respectively, then and in such case the annual Sum or Sums hereinbefore directed to be paid, applied and disposed of for the benefit of such of the said Charities, whereof there shall be no such Anniversary Dinner or Dinners respectively, shall be paid to the Treasurer or respective Treasurers thereof, respectively, at the period or time of the year, or respective periods or times of the year, when the general annual Collection or Collections for the same Charity or Charities, respectively, shall take place; the first annual payment of such annual sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, to begin to be made at the several and respective

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Anniversary Dinners, or at the respective times of the several and respective general Anniversary Collections, as the case may be, which shall first and next happen after my decease respectively. And I hereby further declare my Will to be, that, in case the Dividends, Interest and annual Proceeds of the said London Dock Stock, hereinbefore given and bequeathed to the said President, Treasurer and Governors for the time being of Christ's Hospital aforesaid, upon the trusts aforesaid, shall, at any time or times, be more than sufficient to pay the said several sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, amounting together to the annual sum of 1,000*l.*, then, and in such case, the surplus of such Interest, Dividends and annual Proceeds shall, from time to time, be divided into two equal Moieties, and one Moiety thereof shall be paid to or retained by the President, Treasurer and Governors for the time being of Christ's Hospital aforesaid, for the benefit of the same Institution, nevertheless subject to such and the like Conditions as are hereinbefore contained with respect to the said sum of 1,000*l.* hereinbefore bequeathed to the said President, Treasurer and Governors of Christ's Hospital aforesaid, and the other moiety of such Surplus shall be paid to the Treasurer for the time being of Hetherington's Charity for the Blind, under the management of Christ's Hospital aforesaid."

After some other Bequests, the Testator gave the residue of his Estate and Effects unto his Nephews and Nieces living and born at his decease, share and share alike, as tenants in common, for their own absolute use and benefit.

The Testator, by a Codicil, dated in April 1821, after
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reciting the bequest of 30,000*l.* Stock of the London Dock Company, and that doubts might be entertained whether he could, consistently with the provisions of the Mortmain Laws, legally and effectually bequeath London Dock Stock upon the trusts in his Will expressed concerning such Stock, revoked the Gift and Bequests, in his Will made, to the President, Treasurer and Governors of Christ's Hospital aforesaid, of the said 30,000*l.* London Dock Stock, and, in lieu thereof, gave to them 40,000*l.* Three per Cent. Consolidated Bank Annuities, upon the same trusts, and for the same purposes as were in his Will expressed concerning the London Dock Stock.

The Bill was filed by some of the residuary Legatees, who insisted that, with regard to the 40,000*l.* Three per Cent. Stock bequeathed by the Will and Codicil to the President, Treasurer and Governors of Christ's Hospital, such Bequest was only good in respect of such Charities as were specifically named and pointed out by the Testator as the objects of his Bounty; and that, in regard to all such other parts of the 40,000*l.* Three per Cent. Stock, in respect of which Blanks were left by the Testator in his said Will for the Names of the other Charities which were to be entitled, or the Sums to which they were to be entitled, the same were void for uncertainty; and that so much of the said 40,000*l.* Three per Cent. Stock, as was not well bequeathed by the Will, fell into and constituted a part of the general residuary Personal Estate of the Testator.

The Governors of Christ's Hospital, by their Answer, claimed an Interest in so much of the 40,000*l.* Three per Cent. Stock, and the Interest or Dividends thereof, as was not specifically bequeathed by the Will, and in respect

of which Blanks were left in the Will; and insisted that, as such Governors, they were alone entitled to apply and distribute such parts of the 40,000*l.* Three per Cent. Stock, or of the Interest and Dividends thereof, in respect of which such Blanks were left, either for the benefit of Christ's Hospital, or to such other charitable purposes as they might think proper, and that the same did not pass to, and form a part of, the general Personal Estate of the Testator.

Mr. *Heald*, and Mr. *Phillimore*, for the Plaintiffs:—

This cannot be held to be a Gift for charitable purposes, generally; because not only the mode of Application is left uncertain, but the very Sum which is to be the substance of the Gift is undefined. *Mills v. Farmer* (a). The Court has certainly held that, where a Testator gives a Legacy to a Charity, to be named in a Codicil to his Will, although no Codicil is made, it is a good Gift for general charitable purposes, to be effectuated under the direction of the Court. But, in all these Cases, the precise amount of the Gift is specified by the Testator. Where the Amount is not specified, as in this Case, there is so much uncertainty that the Court cannot act.

Mr. *Turner*, for some of the residuary Legatees, who were Defendants:—

The Cases have certainly gone a great length in effectuating a general intention to give for a charitable purpose. But if the Court can collect that it was not the intention to dispose of the Legacy at all, unless for some particular Charity, there is great difficulty in holding that there is any Gift at all for any charitable purpose.

(a) 1 Mer. 55.

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Mr. *Daniell*, for the Governors of Christ's Hospital:—

It is plain, as the Blanks were not filled up, and as there is a general Gift to a Charity, that the Testator meant, if he did not fill up the Blanks, that the whole should go to Christ's Hospital. In *Moggridge v. Thackwell* (b), the *Lord Chancellor* laid down the principle that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the Disposition is in the King by sign manual: but where the execution is to be by a Trustee, with general or some objects pointed out, there the Court will take the Administration of the Trust. On the authority of that Case, the execution of the charitable Trust is here, by the Will, vested in the Governors of Christ's Hospital, who would be entitled to lay before this Court a Scheme for the Administration of the Charity. *Baylis v. The Attorney-General* (c), and *Wheeler v. Sheer* (d), are to the same effect.

Mr. *Wray*, for the *Attorney-General*:—

This is a stronger Case than *Mills v. Farmer*; for, in that Case, and in a Case in 2 Freeman, 262, Ca. 330, b. there cited, the Court proceeded upon a mere general indication to give to a Charity. In that Case the disposition of the Fund was left to the Crown, and the same course should be pursued here.

The VICE-CHANCELLOR:—

The Testator gives, to the President, Treasurer and Governors of Christ's Hospital, a Legacy of 1,000*l.*, upon condition that they, and their Successors for ever,

(b) 7 Ves. 86. (c) 2 Atk. 239. (d) Mos. 288.

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do distribute and pay the various annual Sums next in his Will directed to be paid, to the various charitable and other Establishments thereafter mentioned; and, for that purpose, he gives, to the President, Treasurer and Governors of the Hospital, 30,000*l.* Stock, bearing an Interest of four per Cent., in the London Dock Company, commonly called London Dock Shares, upon the trusts after mentioned, that is to say, upon trust that they, the President, Treasurer and Governors for the time being, should, from time to time for ever thereafter, receive the Dividends, Interest and annual Proceeds of the Dock Shares, and should apply the same in the manner and for the purposes thereafter mentioned: he then directs that, of such Interest and Dividends, they shall every year pay the sum of 100*l.* to the Treasurer of the London Hospital, for the sole use and benefit of that Charity; and, in like manner, he directs that, of such Interest and Dividends, they shall every year pay certain other Sums, amounting together to 650*l.*, to nine other charitable Institutions, for the use and benefit of those Charities; he then directs that they shall, every year, pay the sum of , other part of the said Interest and Dividends, to the Treasurer of , to be by him applied for the benefit of that Charity; and these blank Gifts are four times repeated in the same form of expression. He then directs that they do and shall, every year, pay the sum of 200*l.*, being the residue of the said Interest and Dividends, to the Earl of *Chichester* for the time being, to be by him applied to certain other charitable purposes there specified. This last disposition makes it evident that the four blank Gifts were intended to amount together to the sum of 250*l.*, which, being added to the sum of 750*l.* before given, and the 200*l.* after given to the Earl of *Chichester*, would complete the

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full sum of 1,200*l.*, being the amount of the annual Interest or Dividends on the 30,000*l.* Stock in the London Dock Company.

The effect of this Will is, that it manifests a general disposition of the Testator to dispose of the sum of 1,200*l.* in Charities; but that the Testator had not absolutely made up his mind as to the particular Charities which should share in the 250*l.*

I am of opinion, upon the authority of the Case of *Mills v. Farmer*, and the Cases there referred to, that this Court will execute that general intention; and that it must, in that case, be referred to the *Master* to approve of a Scheme for the application of this 250*l.*, having regard to the nature and character of the other Gifts contained in the Will.

1825.
29th June.
17th August.

WINTER v. BLADES.

*Vendor and
Purchaser.
Interest.*

THE Bill in this Cause was filed, by the Vendor of an estate, merely for the purpose of claiming Interest on the Purchase-money from the time the Defendant, the Purchaser, was let into Possession. The Purchase-money was 14,000*l.* and, immediately upon entering into the Contract, the Purchaser called in a sum of Money, secured by a Mortgage, amounting to 12,400*l.*; and, upon entering into possession of the Estate, gave Notice to the Vendor that he was ready to invest the Purchase-money as he should direct, pending the investigation of the Title. The Vendor, hoping for an immediate conclusion of the Purchase, did not answer that Notice. The investigation of the Title, however, occupied nine Months.

Where the Purchaser, upon entering into Possession, paid the amount of his Purchase-money to his Banker, and gave Notice that he was ready to invest it in such manner as the Vendor should require; but no Answer was returned to that Notice, and the Purchaser, during the investigation of the Title, kept in the hands of his Banker a Balance equal to the amount of the Purchase-money, except for four Days, when it was a little less: the Court held the Purchaser not liable for Interest on the

The Banker of the Defendant proved that, during the nine Months, the Balance of the Defendant in his hands was never less than 14,000*l.*, except during three successive Days, when it was 13,876*l.*, and one other Day, when it was 13,796*l.*

Mr. *Horne*, and Mr. *Pemberton*, for the Plaintiff:—

The Court has held the Purchaser liable to pay Interest in Cases much stronger than the present. In *Powell v. Martyr* (a), it was decided that there must be absolute Notice, not only that the Purchase-

difference between his average Balance during the period in question and during the three preceding years.

(a) 8 Vcs. 146.

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money is appropriated, but also that it is unproductive, in order to relieve the Purchaser from payment of Interest. In that Case, there were two circumstances stronger than any which occur in the present; for it was there proved, 1st, that the amount of the Purchase-money was paid by the Purchaser into the hands of his Solicitor; and 2d, that it was appropriated for payment to the Vendor. Here there was no Appropriation. The Money was merely paid by the Defendant into the hands of his Banker, where he must have had a Balance, at any rate. *Comer v. Walkley (b)*, and *Dickenson v. Heron (c)*, are Cases in which, notwithstanding long delays in completing the Purchase, and delays not imputable to the Purchaser, he was yet decreed to pay Interest. It must be admitted that the Defendant here stated that the Money was ready, and might be invested at the desire of the Plaintiff. But that is not sufficient; for, if the Money was invested in Exchequer Bills, it would still have been ready, but not unproductive; for it is settled there must be distinct Notice that the Money is unproductive. There are Cases in which the Court charges a Party with Interest on Trust Money, even where he has made no Profit on it, but kept it idle at his Banker's; for the Court considers that as an employment of the Money, because it relieves the Party from keeping there a balance of his own Money. The Defendant cannot avail himself of the fact which he endeavours to establish, as to the delay in the completion of the Title being the fault of the Plaintiff. The principle on which the Court acts as to the payment of Interest is, that the Fund is

(b) Cited from Reg. Lib. in Mr. Sugden's *Treatise on Vendors and Purchasers*, 6th Edit. 481 & 482.

(c) Ibid.

productive, or that the Vendor has no notice of its being unproductive.

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Mr. *Hart*, and Mr. *Pepys*, for the Defendant, insisted on the facts that the Money had been unproductive; that the delay had been occasioned entirely by the Plaintiff, although the Defendant did all in his power to urge him on to a completion of the Contract; and that the Defendant had called in a Mortgage, for the sole purpose of obtaining the Money to pay for his Purchase; and that, at the very time when the Plaintiff sent notice that he expected Interest at five per cent., he had not shown a good Title to the Estate.

The *Vice-Chancellor* recommended the Parties to come to a Compromise; but, as they declined doing so, the Case stood for Judgment.

THE VICE-CHANCELLOR :—

If, after the Notice given by the Defendant, he had made no profit of the Purchase-money, then it would not be reasonable that he should be charged with Interest. But that he has made some profit of the Money appears upon the Defendant's own evidence; first, because his Balance at his Banker's was, in a small degree, and for a few days, reduced below the amount of the Purchase-money; but, principally, because the Purchase-money supplied the place of that Balance, which he must otherwise have maintained at his Banker's.

Let the *Master* inquire what was the average Balance which the Defendant maintained at his Banker's during the three years preceding the Purchase, computing such Balances at the end of every month; and let the

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Master also inquire what was the average Balance which, during the time in question, the Defendant maintained at his Banker's, computing such Balance monthly; and let the *Master* deduct what he shall find to have been the Defendant's Average balance for the three years, from what he shall find to have been the Defendant's average Balance during the time in question; and declare that, to the amount of that difference, the Defendant is not chargeable with Interest on his Purchase-money.

11th July.
17th August.

KILVINGTON v. GRAY.

Devise.
Residue.

Testator directed his Residuary Estate to be laid out in the purchase of Land, as soon as a convenient Purchase could be found, in the County of York, which, upon a fair letting, would produce a yearly Rent equal to three and a half per cent upon the amount of the

Purchase-money, and, in the mean time, the Interest of his Residuary Estate to be accumulated. The Tenant for Life will be entitled to the Interest of the Residuary Estate, from the end of one Year after the Testator's death, until it is laid out as directed.

THOMAS KILVINGTON, by his Will, dated in 1822, after devising his Real Estates to the Plaintiff for Life, with divers Remainders over, disposed of the Residue of his Personal Estate in the following manner:—

“ I give and bequeath all the Rest and Residue of my Personal Estate and Effects, of what nature soever, which shall remain after payment of my Debts, Legacies, Funeral and Testamentary Expenses, unto *William Gray* and *Francis Barrowby*, their Executors, Administrators, and Assigns, upon trust that they do and shall lay out and invest the same in the purchase of Messuages, Manors, Lands, Tenements and Hereditaments of Inheritance, in fee-simple, in possession, to be situated in

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The County of York, when and as soon as a convenient Purchase or Purchases can be found, which, upon a fair letting, will produce a yearly Rent equal to three and a half per cent. upon the amount of the Purchase-mones: to be paid for the same: and do and shall convey, settle and assure such Manors, Lands, Tenements and Hereditaments to such and the same uses; upon and for the same trusts, intents and purposes, and with and under and subject to such and the same powers, provisoes and declarations as are hereinbefore limited, expressed and contained of or concerning my Freehold Lands, Messuages, Tenements, Tithes and Hereditaments first hereinbefore devised, or such or so many of them as shall be then subsisting or capable of taking effect. Provided always, and I declare my Will to be, that, in the mean time, and until such Purchase or Purchases as aforesaid can be found, the said *W. Gray* and *F. Barrowby*, their Executors, Administrators and Assigns, shall lay out and invest, in the public Stocks or Funds, such part of my Residuary Personal Estate as shall not, at the time of my decease, consist of Stock in the public Funds, and shall permit and suffer such part thereof as shall consist of Stock in the public Funds to remain in the same Funds: And I direct that the said *W. Gray* and *F. Barrowby*, their Executors, Administrators and Assigns shall, from time to time, receive the Interest, Dividends and annual Produce of all the said Stocks and Funds, and lay out and invest the same in or upon Stocks or Funds of the same nature, so that the same Stocks or Funds, Interest, Dividends and annual Produce may, until such Purchase of Lands or Hereditaments as aforesaid can be found, accumulate: and I do hereby declare and direct that the said

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W. Gray and F. Barrowby, their Executors, Administrators and Assigns, shall stand and be possessed of all the Interest, Dividends and annual Produce, Stocks and Funds, and the accumulation thereof respectively, upon the same Trusts as are hereinbefore declared of and concerning my Residuary Personal Estate, from which such accumulations shall have proceeded."

The Will also gave the usual Power of Sale and Exchange to the Trustees.

The Testator died in September 1823.

The Bill prayed that the Trusts of the Will might be carried into execution; that the Residue of the Personal Estate might be ascertained and invested under the direction of the Court; and, until a Purchase could be found, that the clear Income of the Residue might be paid to the Plaintiff.

Mr. Hart, and *Mr. Pemberton*, for the Tenant for Life:—

At the present price of Land, it is in vain to expect that it can be bought so as to yield the per centage fixed by the Testator. This Case must be decided on the authority of *Angerstein v. Martin* (a), and *Hewett v. Morris* (b); and the Tenant for Life must be held entitled to Interest upon the Residue from the time of the Testator's death. It is important to observe that the Will gives to the Trustees a Power of Sale and Exchange.

(a) 1 Turn. 232.

(b) Ibid. 241.

Mr. *Wray*, for an Infant Defendant entitled in
Remainder :—

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Sitwell v. Barnard (c) is exactly similar to this Case, except that there the direction was to invest the Residue, with all convenient speed, in the purchase of Lands; whereas here, Lands in a particular situation are mentioned.

Mr. *Barber*, and Mr. *Turner*, for other Defendants.

The VICE-CHANCELLOR :—

The question in this Cause is, whether from any and what period the Tenant for Life of the devised Freehold Estates, is entitled to the Interest of the Residuary Personal Estate, which had not been laid out in Land.

This Case differs from *Sitwell v. Barnard* only in this circumstance: that the Testator directs his Residuary Personal Estate to be laid out in the purchase of Land, not with all convenient speed, as in the Case of *Sitwell v. Barnard*, but when and as soon as a convenient Purchase can be found in the County of *York*, which, upon a fair letting, will produce a yearly Rent equal to three and a half per cent. upon the amount of the Purchase-money. I cannot intend that the Testator meant to use the latter words as strict words of Condition, and that no Person should ever beneficially enjoy this part of his Property until such Condition was absolutely complied with, which, by possibility, might never happen. But I must consider the expression used as merely directory, and meant to enforce a diligent and cautious attention on the part of the Trustees in the discharge of their duty. Adopting this construction, the Case becomes the same as *Sitwell v.*

(c) 6 Ves. 520.

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12th July.
17th August.

Will.
Construction.

Barnard; and I shall follow that Case in d that the Tenant for Life is entitled to all Interest Testator's Residuary Personal Estate, accruing at the end of one Year after the Testator's death (d).

BIRD v. WOOD.

Bequest to the Testatrix's Daughter for Life, and after her death as she should appoint, and, in default of Appointment, to the Testatrix's next of Kin, to be considered as a vested Interest from the Testatrix's death, except as to any Child afterwards born of her daughter. The Daughter having died without having had any Child, and without executing any Appointment: held that the Persons who would be next of Kin at the Testatrix's death, if her Daughter had been then dead without Children, were entitled.

ELIZABETH LOSH bequeathed to Trust her Interest and Shares in the Funds and Capital transferable at the Bank of England, or which be standing in her Name at her death, or she is entitled unto as the Widow and one of the next of her late Husband, upon trust to pay the Interest Dividends thereof into the proper hands of her daughter *Mary*, the Wife of the Defendant *Thompson* her natural Life; and, after the death of her Daughter, to transfer the Stock, and pay the Interest and Dividends thereof unto such Persons or Person, and Shares and Proportions, as her Daughter, whether she be living or coverte, should, by Deed or Will executed as mentioned, give or devise the same; and, for such Gift or Devise, then upon trust to assign and transfer the Stock, and pay the unpaid Dividends thereof, unto her own next of Kin, according to the Statute of Distributions, to be considered as a vested Interest from the time of the Testatrix's death only as to any Child that might be afterwards born to her Daughter.

The Testatrix's Daughter died intestate, and never having had a Child, and without having executed any Appointment.

(d) See the various Cases commented upon in *Atkinson v. Martin*, 1 Turn. 232. and *Hewett v. Morris*, *ibid.*

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the Power of Appointment. Her Husband survived her, took out Letters of Administration of her Estate and Effects, and now claimed to be entitled to the Fund bequeathed.

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The Bill was filed against him by certain Persons who would have been the next of Kin of the Testatrix at the time of her death, if her Daughter had then been dead without Issue; and the question was, whether they or the Husband were entitled to the Fund.

Mr. *Horne*, and Mr. *Matthews*, for the Plaintiffs:—

It is clear that the Testatrix did not mean to die intestate as to any thing. The Will authorizes the exclusion of the Daughter, because, without excluding her, it is impossible to make sense of it.

Mr. *Boteler*, for Defendants in the same Interest with the Plaintiff, cited *Jones v. Colebeck (a)*, where the Court, on a direction that, upon the decease of the Testator's Daughter without Issue, the Estate should go in a due course of Administration, held that those who were next of Kin at the death of the Daughter were entitled.

Mr. *Phillimore*, for the Daughter's Husband, cited *Holloway v. Holloway (b)*, and *Doe v. Lawson (c)*.

Mr. *Abercrombie*, for other Defendants, said that the clear meaning of the words was, that the Persons who were next of Kin at her death should take; and that their Interest should become vested upon her death.

(a) 8 Ves. 38. (b) 5 Ves. 399. (c) 3 East, 278.

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Mr. *Wray*, for other Defendants.

The VICE-CHANCELLOR:—

The Persons who, at the Testatrix's death, would have been her next of Kin if her Daughter had been then dead without Children, are plainly intended here. The Daughter could not be such next of Kin; for the Persons intended were to take at her Death: and the Persons intended must have been living at the Death of the Testatrix; for their Interests were then to be vested.

17th August.

*Vendor and
Purchaser.*

GELL v. WATSON.

—
Purchase-
money paid
into Court is
the Property
of the Vendor.

THE *Vice-Chancellor* ruled that, where a Purchaser pays into Court a sum of Money on account and in part of the Purchase-money, it is the Money of the Vendor, who is to take the chance of the rise or fall of the Stocks.

1825.
4th July.
17th August.

REEVE v. HICKS.

Baron and
Feme.
Mortgage.

THIS was a Bill for the redemption of a Mortgage of Freehold and Copyhold Estates.

In March 1760, *Anne Reeve*, being seised in Fee of certain Copyhold Estates, joined with *Bendall Reeve*, her Husband, in making a voluntary Surrender of them to the use of herself for Life, remainder to *Bendall Reeve* for Life, remainder to the Children or Grandchildren of *Anne Reeve*, living at her Death, in such Shares as she should appoint; and, in default of Appointment, to her Children, as Tenants in Common in Fee: but, if she should die in the Lifetime of *Bendall Reeve*, and leave no Child or Grandchild living at her Decease, or they should all die in the Lifetime of *Bendall Reeve*, under the age of Twenty-one, and without Issue, then to the use of *Bendall Reeve* in Fee.

Bendall Reeve, being seised in Fee, in right of his Wife, of certain Freehold Estates, by Indenture, dated the 10th of February 1770, joined with his Wife in demising them for a term of 1,000 Years, by way of Mortgage, to *John Burrell*, to secure the repayment of a sum of Money lent to him by *Burrell*. This Deed contained a reservation of a pepper-corn Rent, during the Term, to *Bendall Reeve* and *Anne* his Wife, and to the Heirs and Assigns of *Anne*; and also a Covenant, on the part of *Reeve*, for himself and his

Husband and Wife mortgaged the Wife's Freeholds for 1,000 Years, reserving the Power to redeem to them, or either of them, and covenanted to levy a Fine to the Mortgagee for the Term, and, subject thereto, to the Husband in Fee: they also surrendered the Wife's Copyholds to the Mortgagee in Fee, reserving the Power to redeem to the Husband and his heirs; the Husband afterwards released his Equity of Redemption, as to both Estates, to the Mortgagee in Fee: the Mortgagee entered into

Possession, and the Husband afterwards died: Held that the Wife is entitled to redeem the Copyholds, but not the Freeholds.

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Wife, that they would, as of the next Term, at his Costs and Charges, levy a Fine *sur conuzance de droit come ceo*, &c. with Proclamations, of the Estates thereby demised, to the use of *Burrell* for the Term thereby demised, for better securing the Mortgage-money, and, subject thereto, to the only use and behoof of *Reeve*, his Heirs and Assigns, for ever, and for no other use, intent or purpose whatsoever. The Clause for Redemption provided that, upon repayment of the Mortgage-money and Interest, by *Bendall Reeve* and *Anne* his Wife, or either of them, their or either of their Heirs, Executors, Administrators or Assigns, upon the 10th of February 1771, the term of 1,000 Years should cease.

A Fine was duly levied by *Reeve* and his Wife, pursuant to the Covenant.

By an Indenture, dated the 27th of December 1775, after reciting that one *Hicks* had paid off the Mortgage-money due to *Burrell*, *Reeve* and *Burrell* assigned the remainder of the 1,000 years Term to *Hicks*, with a proviso that, upon repayment of the Mortgage-money by *Reeve*, his Heirs, Executors or Administrators, on the 27th of June 1775, the Term should cease; and *Reeve* covenanted that, for better securing the Mortgage-money, he and his Wife would surrender the Copyhold Estates to *Hicks* in Fee, subject to the same proviso for Redemption as was reserved as to the Freeholds.

On the 3d of January 1776, *Reeve* and his Wife surrendered the Copyhold Estates to *Hicks* in Fee, pursuant to the last-mentioned Covenant.

By Indentures of Lease and Release, dated the 20th and 21st of August 1779, made between *Reeve* of the

one part, and *Hicks* of the other part, after reciting that no part of the Principal Money or Interest secured by the Mortgage to *Hicks* had been paid, but that a larger Sum was due in respect of it than the mortgaged Estates were really worth, *Reeve* released to *Hicks*, his Executors, Administrators and Assigns, all his Equity of Redemption in the Freehold and Copyhold Estates.

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HICKS.

After this Release, *Hicks* entered into Possession both of the Freehold and Copyhold Estates, and was admitted to the Copyholds, which he surrendered to the use of his Will; and died in 1801, having devised his Freehold and Copyhold Estates to the Defendant.

Reeve died intestate, in 1809, leaving his Wife surviving him.

The original Bill was filed in 1820, by her and her two Children, for a Redemption of the Freehold and Copyhold Estates.

Mr. *Treslove*, for the Plaintiffs:—

If there be nothing more than a mere Mortgage of the Wife's Estate, it is settled that a Husband cannot deprive her of the Equity of Redemption by reserving it to himself and his Heirs alone. *Corbett v. Barker* (a) applies to this Case, and is of higher authority, because the Court did not adhere to the opinion which it first pronounced. In the Report of that Case, however, there is a mistake in saying that the Equity of Redemption was reserved by Fine. This Error in the Report was noticed by Mr. *Richards*, in his Argument in *Innes v. Jackson*.

(a) 1 Ans. 138, and 3 Ans. 755.

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Mr. Sugden, and Mr. Kindersley, for the Defendant:—

1st. As to the Freehold Estates. The Court is here asked, at the distance of fifty years, to strike out the Limitation of the uses of the Fine to the Husband. It is a strong circumstance towards inducing the Court to give effect to the Limitation in favour of the Husband, that a Term only is limited to the Mortgagee, and not the whole Fee-simple. There is no Case in the Books in which, there being a distinct Limitation to the Husband, and nothing indicating a different intention on the face of the Deed, that Limitation has been held to be nugatory. Supposing the Wife had intended to limit the Estate to her Husband, as appears on the face of this Deed, it would make no difference who was to pay the Mortgage-money. *Innes v. Jackson* (b), as decided in the House of Lords, went to this extent, that, although there be no Declaration on the face of the Mortgage Deed of an intention to limit the Equity of Redemption to the Husband alone, yet, if there be, in the Deed, express words which so limit it, effect must be given to those words. *Corbett v. Barker* (c) was a Case quite different from the present, because there was in it a gross and manifest inconsistency on the face of the Deed, which contained no Limitation at all to the Husband, but only a reservation to him of the Equity of Redemption. The whole amount of that Decision was, that an inaccurate expression should not be so construed as to pervert the whole Deed. But, even there, the first Decision of the Court, when Chief Baron *Eyre* presided, was, that the Husband was entitled; and, although afterwards the Court altered its opinion, when Chief Baron

(b) 1 Bligh, 104.

(c) 1 Ans. 138. 3 Ans. 755.

Macdonald presided, it must be admitted that the latter Decision was not likely to carry greater weight with it than that of the former Chief Baron. And, when the last Decision on that Case is carefully examined, it will be found that it cannot stand. Where a party is held to be bound by a Deed, he must also be held entitled to all the benefits which the Deed confers on him. What the Plaintiff asks in this Case is, to cut down the Deed so as to give her all the benefits which can be had under it, and to throw the whole burden on her Husband.

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2d. As to the length of time. The Wife was here under the same disability at the time when the Mortgage was made, as that which can alone be relied on as excusing the length of time which has elapsed before she claimed this Equity of Redemption. She cannot be heard to say that she stands in a new situation, which gives her new Rights; as the very Right which she claims arises from her own acts during the disability of her Coverture. *Cholmondeley v. Clinton* (d).

3d. As to the Copyholds. The Defendant is clearly entitled to them, the Surrender in 1760 being merely voluntary, and the Stat. 27 Eliz. c. 4. including Copyholds. *Doe v. Routledge* (e).

Mr. Treslove, in reply :—

The Deed of 1770 contains a *reddendum* to *Bendall Reeve* and *Anne* his Wife, and to the Heirs of *Anne*. That is clear evidence of an intention to reserve the Equity of Redemption to her, as the Rent is incident to the Reversion.

(d) 2 Jac. and Walk. 1.

(e) Cowp. 705.

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2d. As to the length of time with reference to the disability of Coverture. *Corbett v. Barker*, and *Cornel v. Sykes* (f), are express authorities that length of time is no bar to such a Claim, where there has been the disability of Coverture. In the former of those Cases there had been a lapse of Forty Years before the institution of the Suit.

THE VICE-CHANCELLOR :—

This Case is not distinguishable in principle from *Innes v. Jackson*. The Limitation of the uses of the Fine to the Husband and his Heirs, has no connection with the purpose of Mortgage, or the proviso of Redemption, but is altogether a new Settlement which defeats the Heir of the Wife.

Declare the Freeholds to be irredeemable, and the Copyholds to be redeemable by the Plaintiff; and refer it to the *Master* to apportion the Mortgage-money between the Freeholds and Copyholds; the Plaintiff to be at liberty to redeem the Copyholds, on payment of what the *Master* shall apportion as to the Copyholds, with Interest, with an account of the Rents and Profits from the Death of *B. Reeve*.

(f) 1 Cha. Rep. 193. See also *Jenner v. Tracey*, and *Belch v. Harvey*, 3 P. W. 287. note B.

KINCH v. WARD.

THIS Suit was instituted to enforce the performance of an Agreement entered into by the Plaintiffs, who were the Executors of one *Thomas Edoe*, for the Sale of some Leasehold Property which *Thomas Edoe* became entitled to under his Father's Will. The Defendant, the Purchaser, demurred to the Bill, generally. On the Argument of the Demurrer the question was, whether *Thomas Edoe* took the absolute, or a life Interest only in the Property, under his Father's Will.

The Will was as follows:—"I give and devise unto *Thomas Kinch* and *Thomas Ebsworth*, all and singular my Freehold and Copyhold Estates, situate, lying and being in the parish of *Great Farringdon*, in the County of *Berks*, or elsewhere in *Great Britain*, all which Copyhold Estates I have already, or do intend to surrender to the use of this my last Will and Testament. Item, I give and devise unto the said *Thomas Kinch* and *Thomas Ebsworth*, all and singular my Leasehold Estates, situate, lying and being in the parish of *Great Farringdon* aforesaid, and in *Radcott* in the County of *Oxford*, and elsewhere in *Great Britain*, to have and to hold all and singular my said Freehold and Copyhold Estates unto the said *Thomas Kinch* and *Thomas Ebsworth*, and the Survivor of them, his Heirs and Assigns, and to have and to hold all and singular my said Leasehold Estates and Premises unto the said *T. Kinch* and *T. Ebsworth*, and the Survivor of them, his Executors, Administrators and Assigns, for all such Term and Terms of

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3d November.

Devise. Construction.

Devise of Freeholds and Leaseholds to *A.* for Life, and after his Decease to the Heirs of his Body, their Heirs, Executors, &c. gives *A.* an Estate Tail in the former, and the absolute Interest in the latter.

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Years, Estate and Interest, as I shall have therein to come and unexpired at my Decease, upon the several trusts, and to and for the several uses, intents and purposes, and subject to the several provisoes and conditions hereinafter mentioned and declared of and concerning the same respectively, (that is to say,) as to, for and concerning all and singular my said Freehold, Copyhold and Leasehold Estates and Premises, upon trust to permit and suffer my Wife, *Mary*, to have, receive and take the Rents, Issues and Profits thereof for and during the term of her natural Life, or for so long time as she shall continue my Widow, and unmarried, for and towards her support and maintenance, and the maintenance, education and bringing up of my Children, *Thomas, William, Margaret and Mary Edoe*; and, from and immediately after the decease of my said Wife, or intermarriage with any other Husband, then upon trust to permit and suffer my son, *Thomas Edoe*, to receive and take the Rents, Issues and Profits of all that Messuage or Tenement called the *Bear Inn*, with the Garden, Stables, Outhouses, Buildings and Appurtenances thereunto belonging, situate, lying and being in *Great Farringdon* aforesaid, and of all that Messuage or Tenement, with the Appurtenances, now in my own possession, situate in *Great Farringdon* aforesaid, and also of all that Meadow or Pasture Ground, situate, lying and being in *Radcott*, in the County of *Oxford*, called or known by the name of *Rye Meadow, Honeyham*, and the *Staff*, containing by estimation forty-five Acres, be the same more or less, for and during the term of his natural Life; and, from and immediately after the decease of my said Son *Thomas Edoe*, then I give and devise the said two Messuages or Tenements, and Close of Meadow or Pasture Ground, with the Appurtenances, unto the Heirs of

the body of my said Son *Thomas Edoe*, lawfully begotten, their Heirs, Executors, Administrators and Assigns, for ever; but in case my said Son *Thomas Edoe* shall die without Issue, then I give and devise the said two Messuages or Tenements, and Close of Meadow or Pasture Ground, with the Appurtenances, unto my said Trustees, upon trust for the benefit of my said Son *William Edoe*, and the Heirs of his body lawfully begotten, in like manner as I have hereinbefore given and devised the same for the benefit of my said Son *Thomas Edoe*, and the Heirs of his body lawfully begotten; and, for default of Issue of the body of both my said Sons *Thomas* and *William Edoe*, then I give and devise the said two Messuages or Tenements, and Close of Meadow and Pasture Ground, with the Appurtenances, unto my two Daughters *Margaret* and *Mary*, and to their respective Heirs, Executors, Administrators and Assigns, for ever, to take as Tenants in Common and not as Joint Tenants."

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The Testator left his Widow, and the four Children named in his Will, surviving him. *Thomas Edoe*, on his Mother's death, entered into possession of all the Estates. *William Edoe* died in the Lifetime of *Thomas*, leaving Issue a Daughter. *Thomas Edoe* died in February 1823, without Issue. One of the Testator's Daughters also was dead when the Bill was filed; the other was still living.

Mr. *Sugden*, and Mr. *Temple*, in support of the Demurrer:—

The question is, whether the Trustees can make a good Title to the Leaseholds; or, in other words, whether *Thomas Edoe*, the Son, took a *quasi* Estate Tail in

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them, or a Life Estate only. We contend that he took a Life Estate only, and that, upon his Decease, his Children took the Property as Purchasers. In the first place, the Bequest to the Heirs of the Body is distinct from that to the Ancestor; for the Testator gives the Estate to Trustees, in trust to permit his Son to receive the Rents thereof, which creates a Trust that expires at the death of the Son. But he devises the Messuages themselves to the Heirs. This distinction was taken in *Shapland v. Smith* (a), and there are other Cases to the same effect cited in *Fearne Cont. Rem.* 158, 6th Edition. In the next place, words of Limitation are superadded to the Devise to the Heirs. In all Cases where the first taker is held to have an Estate Tail, the Devise to the Heir would give him an Estate Tail also. Here the Devise to the Heir of *Thomas Edoe*, the Son, gives him an Estate in Fee as to the Freeholds, and the absolute Interest as to the Leaseholds. *Loddington v. Kime* (b). There is no inconsistency in admitting that the Son takes an Estate Tail in the Freeholds, and that he takes a Life Interest only in the Leaseholds; for the same words may have a different effect, as applied to one species of Property, from what they have when applied to another. *Forth v. Chapman* (c). The Case of *Hodgeson v. Bussey* (d) closely applies to the present one; indeed, it is impossible for two Cases to be more like each other. The Case of *Wilkinson v. South* (e) also supports the construction which we are contending for. The Court was not, in that Case, called upon to give an opinion whether the first taker took a Life Estate, or a *quasi* Estate Tail, for the Property would have gone over in either case, yet

(a) 1 Bro. C. C. 75. (b) 1 Salk. 224. S. C. 1. Lord Raym. 203.

(c) 1 P. W. 663. (d) 2 Atk. 89. (e) 7 T. R. 555.

Lord *Kenyon*, C. J. expressed an *obiter* opinion that the first taker took a Life Estate only.

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Mr. *Pemberton*, in support of the Bill :—

It is clear that the Testator intended to make a general disposition of his Freeholds, Copyholds and Leaseholds. He gives them all in one mass. The Term in the Leaseholds was 500 years, which is equivalent to a Freehold Interest. It is quite settled that a Devise to *A.*, to permit and suffer *B.* to take the Rents, gives the legal Estate to *B.* In *Shapland v. Smith* the Trustees were directed to pay Rates, Taxes and Repairs out of the Rents, and to pay the Residue to the Testator's Brother; and, therefore, it was necessary that they should take the legal Estate. If the Will had concluded with the Devise to the Heirs of the body of *Thomas Edoe*, their Heirs, Executors, Administrators and Assigns, it would have admitted of considerable doubt, whether the Heir would not have taken absolutely, and the Father, for Life only. But, even in that Case, the observations of Lord *Kenyon*, C. J. in *Wilkinson v. South*, are sufficient to make the Court pause before it come to that Decision. In *Hodgeson v. Bussey*, Lord *Hardwicke*, C. relied on the words: "*such Issue*;" and, if the words had been: "for want of Issue," he would have decided otherwise. In *Wilkinson v. South* the words were, "in default of such Issue;" yet Lord *Kenyon* seems to think that, unless other words had been introduced, the first taker would have had an absolute Interest. In the Report of that Case it is not mentioned that *Hodgeson v. Bussey* was cited; but it is scarcely possible that it should not have been, for *Read v. Snell* is referred to, and that is reported in the same Book. The effect of the subsequent Clause in

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this Will, is to give the Estate over in default of Issue, generally, and not at a particular period. The words, "but in case my said Son, *Thomas Edoe*, shall die without Issue," mean a general failure of Issue, and give to the former words their technical effect. The consequence is, that the Heir of the Body would take an Estate Tail; and, wherever the subsequent words show that the Heir of the Body would take an Estate Tail, and not a Fee, the Ancestor takes an Estate Tail. It cannot be disputed that, if the question had been what Estate *William Edoe* took, it would have been held that he took an Estate Tail. The clear words in the latter Devise must control, not be controlled by the ambiguous ones in the former. The words, "in default of Issue of the body of both my said Sons," which precede the Devise to the Daughters, show that he meant that Bequest to take effect on a general failure of Issue only, and that the former words should have their legal effect. *Murthwaite v. Jenkinson* (f), *Crooke v. De Vandes* (g), and *Elton v. Eason* (h), are all Authorities in support of the Plaintiff's Case.

Mr. Sugden, in reply :—

The Bequest over has nothing at all to do with the prior Devise. It cannot be brought in aid of the previous Limitation, and can be looked at only when it is disputed whether the Limitation over is, or is not, too remote.

(f) 2 Brod. & Bin. 623, and 2 Barn. & Cres. 357. The Lord Chancellor, when the Case again came before him, agreed with the Court of K. B. as to the Freehold Property, but held that the Limitation over was good as to the Personalty; see 3 Barn. & Cres. 191; and this Decision has been affirmed by the House of Lords.

(g) 9 Ves. 197.

(h) 19 Ves. 73.

In *Hodgeson v. Bussey*, the construction put upon the words was with a view to give effect to the Limitation over: and, in *Wilkinson v. South*, the question related solely to the Gift over, and not to the Gift to the Heirs of the Body. In that Case there was no Gift, as here, to the first taker, for Life; and therefore this is a stronger Case than that. But Lord *Kenyon* was not required to decide upon the first Gift; and therefore it is unimportant what quantity of Interest was given to the first taker. As to *Crooke v. De Vandes*, and *Elton v. Eason*, they both turned on the validity of the Gift over. In the former of those Cases, no one could pretend to argue that an Estate Tail was not created. But in the present there is a Gift to *Thomas Edoe* for Life, and then a Gift over to his Children. These must be read as two separate and distinct gifts. The Court does look at the Gift over as to Freeholds, but not as to Leaseholds; because no intention as to the latter could give them to the Issue.

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The VICE-CHANCELLOR:—

This Will gives Freehold, Copyhold and Leasehold Estates to Trustees and their Heirs, upon trust to permit the Wife of the Testator to take the Rents and Profits for her Life, and for so long as she should continue his Widow, and, from and after her death, to permit the Testator's Son, *Thomas*, to take such Rents and Profits, for and during the Term of his Life; and, from and after the decease of his Son, *Thomas*, the Testator gave such Freehold and Copyhold and Leasehold Estates unto the Heirs of the body of his Son *Thomas* lawfully begotten, their Heirs, Executors, Administrators and Assigns, for ever; but in case his Son *Thomas* should die without Issue, then he gave the said

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Leasehold, Copyhold and Freehold Estates upon trust for the benefit of his Son *William* and the Heirs of his Body lawfully begotten, in like manner as he had thereinbefore given and devised the same for the benefit of his Son *Thomas* and the Heirs of his Body; and, for default of Issue of both his said Sons, then he gave and devised the said Estates to his two Daughters, their Heirs, Executors, Administrators and Assigns, as Tenants in Common. The Testator's Son *Thomas* entered upon these several Estates after the death of the Widow, and, the Copyhold part of the Property having been enfranchised, he suffered a Recovery of the Freehold and enfranchised Copyholds, and died without Issue, having, by his Will, devised the Leasehold part of the Property to the Plaintiffs, who have entered into a Contract for Sale of the same to the Defendants. This is a Bill for the specific performance of that Contract; and the Defendant has demurred to it, upon the ground that the Will of the original Testator did not give the absolute Property of the Leasehold to his Son *Thomas*. It has not been argued that *Thomas*, the Son, did not take an Estate Tail in the Freehold and Copyhold: but it is said that his Devise of the Freehold, Copyhold and Leasehold Estate to *Thomas* and the Heirs of his Body, their Heirs, Executors, Administrators and Assigns, is to be thus rendered, as a Devise of the Freehold and Copyhold to *Thomas* and the Heirs of his Body and their Heirs, and as a Devise of the Leasehold to *Thomas* and the Heirs of his Body, their Executors, Administrators and Assigns; and that, notwithstanding there are subsequent Expressions in the Will which would control the words of Limitation annexed to the Heirs of the Body, and give an Estate Tail to *Thomas* in the Freehold and Copyhold, yet that the words Executors,

Administrators and Assigns, being to be considered as annexed to the Gift of the Leasehold, are not controlled by the subsequent Expressions in the Will, and would, as to that Property, make *Thomas's* Children Purchasers, and cut down *Thomas's* Estate to a Tenancy for Life. The Defendant's Counsel, in support of this Proposition, have relied upon the Case of *Hodgeson v. Bussey*. But that Case differs materially from the present. The Gift over here, after the Limitation to the Heirs of the Body, their Heirs, Executors, Administrators and Assigns, is not, as in the Case of *Hodgeson v. Bussey*, in default of such Issue, but in default of Issue generally. In default of such Issue there, was considered, in default of Children to take as Purchasers ; and the Limitation over was, therefore, good. But here the Limitation over, being after a general failure of Issue, would be void as too remote.

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The Case of *Wilkinson v. South* has also been relied upon for the Defendant: but there it was considered, from the words, " then after the Decease of the first Taker," that the Limitation over was to take effect if no Issue were living at his Death. There are no words here that import such an intention.

It was further argued, by one of the Counsel, that, as the Devise was to Trustees to permit *Thomas* to take the Profits of the Leasehold, *Thomas* took only an equitable Interest, and that the Limitation to the Heirs of his Body, being plainly legal, his Estate was necessarily confined to an Estate for Life. But it has long been settled, beyond all question, that a Devise to Trustees to permit one to receive the Profits of Land, is a legal, and not an equitable Estate. I am of opinion,

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therefore, that the words of Limitation annexed to the Gift to the Heirs of the Body, must be rejected, as well with respect to the Freehold, as the Leasehold Estate, and that *Thomas* took an absolute Interest in the Leasehold Property, and, consequently, the Plaintiffs can make a good Title to the Defendant.

Demurrer overruled.

AGAR v. MACKLEW.

9th November.

*Specific Performance.
Arbitration.*

The Court will not entertain a Bill for the specific performance of an Agreement to refer to Arbitration, nor substitute the Master for the Arbitrators.

THE Bill was filed by Sir *E. F. Agar*, *Henry Trail*, *Daniel Raymond Barker* and *Andrew Macklew*, who, together with *Digby Hamilton*, deceased, were Underlessees of *Parsloe's Club* in *St. James's-street*. The Defendant was the Assignee of their Lessors, *John Fallofield Scott*, *Richard Carpenter*, *William Noble*, *William Bulmer* and *William Hervey*. The Lease to the Plaintiffs contained a Provision in the following words:—

“ If the said *E. F. Agar*, *Digby Hamilton*, *Henry Trail*, *Daniel Raymond Barker* and *Andrew Macklew*, their Executors, Administrators or Assigns, shall, at any time during the said Term hereby granted, be desirous of purchasing all the Estate and Interest then to come and unexpired of the said *J. F. Scott*, *Richard Carpenter*, *William Noble*, *William Bulmer* and *William Hervey*, their Executors, Administrators and Assigns, of and in the said hereby demised Messuage or Tenement, and shall give Notice of such their Desire to the said *J. F. Scott*, *R. Carpenter*, *Wm. Noble*, *Wm. Bulmer*,

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and *Wm. Hervey*, their Executors, Administrators and Assigns, they shall be at liberty to purchase the same, for such Price or sum of Money as shall be fixed upon by two persons, indifferently to be chosen, as Surveyors or Appraisers, the one of such Surveyors or Appraisers to be chosen by the said *J. F. Scott, R. Carpenter, W. Noble, Wm. Bulmer* and *Wm. Hervey*, their Executors, Administrators and Assigns, and the other of such Surveyors or Appraisers to be chosen by the said *E. F. Agar, D. Hamilton, H. Trail, D. R. Barker* and *A. Macklew*, such Price being calculated on the present value of the Lease of the said Premises, which it has been agreed by and between the said Parties hereto amounts to the sum of 5,000 l.: and it is further agreed, by and between the said Parties hereto, that, in case the said Surveyors so to be chosen as aforesaid shall differ about the value of the said Premises, the same shall be referred to a third person, as an Umpire, such Umpire to be chosen and appointed by the other two Surveyors so to be appointed as aforesaid: and it is agreed that the Umpirage or Determination of such third person shall be binding and conclusive upon the said Parties hereto, their Executors, Administrators and Assigns. And the said *E. F. Agar, D. Hamilton, H. Trail, D. R. Barker* and *A. Macklew*, their Executors, Administrators and Assigns, shall, upon payment of such Valuation, be entitled to an Assignment of all the Right and Interest of the said *J. F. Scott, R. Carpenter, W. Noble, W. Bulmer* and *W. Hervey*, their Executors, Administrators and Assigns, of and in the said demised Premises."

The Bill stated the death of *D. Hamilton*; and that the Plaintiffs, being desirous to avail themselves of the
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power of purchasing the Premises, which was so reserved to them in the Lease, had appointed Mr. *Cockerell*, of *Burlington-street*, Surveyor, to value the same on their part, and had required the Defendant to appoint some other Surveyor on his part, to meet Mr. *Cockerell*; which the Defendant had refused to do. The Bill prayed that the Defendant might be directed, by the decree of the Court, to appoint some fit and proper Person to meet Mr. *Cockerell*, the Plaintiffs offering to pay such Price for the Premises as should be settled by the two Arbitrators or Umpire; or, if the Defendant should refuse to join in naming a proper Person, that it might be referred to the *Master* to ascertain the Value, the Plaintiffs offering to pay such Price as the *Master* should fix.

To this Bill the Defendant put in a general Demurrer for want of Equity.

Mr. *Sugden*, and Mr. *Bickersteth*, for the Defendant:

1st. The Court will not decree the specific performance of an Agreement to name Arbitrators to fix the amount of Purchase-money. In *Cooth v. Jackson* (a) the question was discussed; and Lord *Eldon*, following Lord *Rosslyn*, laid it down that the Court would not interfere, even where the substantial thing to be done was agreed between the Parties, but the time and manner in which it was to be done, was that which they put upon others to prescribe. That rule has ever since been uniformly adhered to. In *Milnes v. Gery* (b), there was a Contract for Sale, at a Valuation to be made by Arbitrators; but, as the Arbitrators could not agree

(a) 6 Ves. 34.

(b) 14 Ves. 400.

upon a Price, or upon an Umpire, Sir *William Grant*, held that there could be no specific performance of the Agreement for Sale. *Blundell v. Brettargh* (c) was a much stronger Case; because the Arbitrators were named on the face of the Instrument, and it was provided that the Award should be made within a certain time. In *Gourlay v. Duke of Somerset* (d), Sir *William Grant*, said that there was no instance of a Party seeking the interposition of the Court and obtaining it, where any part of the Relief was to be obtained through the interposition of a third Party. *Wilks v. Davis* (e) is very similar to the present Case; and the *Lord Chancellor* there certainly said that the Court would interfere to ascertain the Value, in order to direct a specific Performance, if the Parties have agreed as to a Valuation, but have not named Parties to make the Valuation; but the Plaintiff's Counsel here may fairly be challenged to produce a single Case where the Court has so interfered. *Morse v. Merest* (f) was a different Case, and did not involve the question which must here be decided. The Court has no Jurisdiction to compel that first step, without which there can be no Sale; and it will never direct, by its Decree, an act over the execution of which it has no control. Suppose the Court were to decree that the Defendant should name an Arbitrator, how could it compel the execution of that Decree? Or, even if an Arbitrator were named, how could it compel that Arbitrator to act? Could it compel the Arbitrators to agree upon a Price? It is the constant doctrine of the Court never to interfere in Cases where it cannot enforce the acts which it is

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(c) 17 Ves. 232. (d) 19 Ves. 429. (e) 3 Meriv. 507.
(f) 6 Madd. 26.

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called upon to direct; and, upon the same principle, it will not decree specific performance of an Agreement for a Partnership; because, as soon as the Partnership was formed, the party might dissolve it, and render the decree nugatory. On the principle that, in order to be entitled to a Decree at all, a perfect Decree must be sought, the Court will not decree the partial redemption of a Mortgage. As to the case of naming Arbitrators to fix a Price, the Court has followed the Civil Law, which provides that, in such cases, it is a mere question of Arbitration, and not within the cognizance of a Court of Judicature.

2d. In the present Case, the Proviso is entirely personal, and is confined to the five Persons named in it. It does not apply to the Survivors of them, or their Representatives, and, therefore, there can be no Relief in the present Case, even if the principles of the Court did not forbid its interference.

Mr. *Hart*, and Mr. *Hayter*, for the Plaintiffs:—

The Cases referred to have no application to the present. What is sought here, is not to appoint an Arbitrator, but a Surveyor, on the part of the Defendant, to value the Materials; and, if the Surveyors do not agree, the Court will ascertain the Value through the *Master*. A Party who comes for specific Performance must have a certain Contract, clear in its Terms; and the Price is of the essence of the Contract. The question here is, whether, where the Contract is complete at its inception, and there is a perfect Contract to sell at a fair Value, if the Parties differ as to their own Judgment of the Value, or refuse to name Arbitrators to fix the Value, the Court can refuse to allow the *Master* to

fix the Value. The mode of ascertaining the Price mentioned in this Proviso, is only stated for the purpose of ascertaining it fairly. This Case differs from the Cases which have been cited in this, that the mode of ascertaining the Value is not here of the essence of the Contract. In *Gaskarth v. Lord Lowther* (g), the Court decreed specific performance of an Agreement to sell at a fair Valuation. *Wilks v. Davis*, and *Milnes v. Gery*, are quite consistent with that, and with every Case like the present, where fair Value is the substance of the Contract, and the Covenant to appoint Arbitrators is only one mode of ascertaining that Value. *Hall v. Warren* (h) is quite in point.

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The VICE-CHANCELLOR:—

There is no weight in the second Objection. The first expression in the Proviso is: "If the five Lessees, their Executors, Administrators or Assigns, shall be desirous of purchasing." It is plain, therefore, that it was not the intention of the Parties that the Power of naming an Arbitrator should be personal to the five Lessees.

As to the more general Objection. I consider it to be quite settled that this Court will not entertain a Bill for the specific performance of an Agreement to refer to Arbitration; nor will, in such case, substitute the *Master* for the Arbitrators, which would be to bind the Parties contrary to their Agreement. The Demurrer must be allowed.

(g) 12 Ves. 107.

(h) 9 Ves. 605.

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15th Nov.

Creditor.
Costs.

ANONYMOUS.

Creditor proceeding at Law against the Executor, after a Decree, allowed his Costs at Law incurred previous to Notice of the Decree, but not his Costs of the motion to restrain his Proceedings.

UPON a Motion to restrain a Creditor from proceeding at Law against an Executor, after a Decree against the Executor, the *Vice-Chancellor* gave the Creditor his Costs at Law, up to the time of his having notice of the Decree; but, after consulting with the Register, refused to the Creditor the Costs of the Motion.

10th and 14th
November.

DREWE v. BIDGOOD.

Satisfaction.

A. being indebted, as his Father's Executor, to the Trustees of his Sister's Marriage Settlement, settled on her and her Children a Sum to a larger amount, in Consideration of the natural Love and Affection he bore them: Held that it was not a Satisfaction of the Debt.

THE Plaintiff, *Dorothy Drewe*, upon the death of her Father, *Charles Bidgood*, became entitled, under his Marriage Settlement, to a sum of 463*l.* 15*s.* 9*d.* She intermarried with the Plaintiff, *John Rose Drewe*, in the lifetime of her Father: and, by the Settlement made on her Marriage, every Provision to which she should become entitled under her Father's Marriage Settlement was assigned to Trustees, (one of whom was her Brother, *C. Bidgood*, the younger,) for her separate use, with power to her to dispose of the same by Deed or Will; and, in default of her disposition, upon trust for the Children of the Marriage, equally, at the usual periods.

Charles Bidgood, the Father, died in March 1797, having in his hands the Funds out of which the 463*l.* 15*s.* 9*d.* was payable. He, by his Will, left two

Legacies of 10*l.* each to Mr. and Mrs. *Drewe* for Mourning, and appointed his Son, *Charles Bidgood*, his Executor and residuary Legatee. By an Indenture, dated in August 1797, made between *Charles Bidgood*, the younger, and one *John Pitman*, of the one part, and *William Drewe* of the other part, after reciting that *C. Bidgood*, the younger, for the natural love and affection which he bore to his Sister, *Dorothy Drewe*, and her two Children, *Dorothy Drewe*, the younger, and *Charles Drewe*, and with a view to make some Provision for *Dorothy Drewe*, the elder, separate from her Husband, and for her Children, had lately, with his own Monies, amounting altogether to 1,994*l.* 16*s.* 9*d.*, purchased divers sums of Stock, amounting in the whole to 4,117*l.* 10*s.* Three per Cent. Consolidated Bank Annuities, in the names of himself and *John Pitman*; *Charles Bidgood*, the younger, and *J. Pitman*, covenanted and declared, to and with *William Drewe*, that they would stand possessed of the Stock, and of the Interest and Dividends thereof, in trust for Mrs. *Drewe*, for her separate use, during her life, and, after her decease, in trust for *Dorothy Drewe*, the younger, and *Charles Drewe*, and the Survivor of them: but, if they should both die in their Mother's lifetime, then in trust for such persons as the Mother should, by Deed or Will, appoint, and, in default of appointment, in trust for her Executors or Administrators. The Deed contained the usual Clauses for the indemnity and reimbursement of the Trustees.

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DREWE
v.
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Charles Bidgood, the younger, died on the 7th of January 1813, having appointed the Defendant *Ann Bidgood*, his Widow, his sole Executrix.

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The Bill was filed for payment of the 463*l.* 15*s.* 9*d.* out of the Assets of *Charles Bidgood*, the Father.

The Defendant, in her answer, submitted that the 463*l.* 15*s.* 9*d.* had been, in the lifetime of *Charles Bidgood*, the younger, discharged or satisfied, or ought to be presumed to have been discharged and satisfied; for that *Charles Bidgood*, the elder, died in 1797, and, by his Will, left no more to Mr. and Mrs. *Drewe* than a small Legacy of 10*l.* each, which they received, without making any claim or demand on *Charles Bidgood*, the younger, for payment of the 463*l.* 15*s.* 9*d.*, or any other sum of Money as being due to them from the Estate of *Charles Bidgood*, the elder; although they well knew that *Charles Bidgood*, the elder, had, in his lifetime, received that sum; and that, although *Charles Bidgood*, the younger, lived for sixteen years after his Father's death, no demand was ever made on him for payment of the 463*l.* 15*s.* 9*d.*, or any part thereof, or any Interest for the same, as a Debt due from the Estate of *Charles Bidgood*, the elder; and *Charles Bidgood*, the younger, was suffered to apply and dispose of the Property and Effects of *Charles Bidgood*, the elder, without any demand having been made on him for payment of such sum of Money, as a Debt: That, after the death of *Charles Bidgood*, the elder, the Defendant had understood and believed that *Charles Bidgood*, the younger, from motives of kindness and affection to Mrs. *Drewe*, his Sister, and her Family, gave her a sum of 2,000*l.*, which was, at different times, and in different Sums, invested in the purchase of Stock in the public Funds, which Stock was transferred into the names of *Charles Bidgood*, the younger, and *John Pitman*, upon trust for the benefit of

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Mrs. *Drewe* and her Children, and which the Defendant submitted was a satisfaction of the 463 *l.* 15*s.* 9*d.*, if the same was really due; that she had found, amongst the Papers of her late Husband, several Letters, which were written by Mr. *Drewe* to him, very shortly after the death of *Charles Bidgood*, the elder, referring to Advances made by *Charles Bidgood*, the younger, to Mr. *Drewe* and his Wife, or of Money which he gave to them, or permitted *Drewe* to receive, or retain and apply, as a Gift or Bounty, for the benefit of *Drewe* and his Wife, and their Family, making up or towards the sum of 2,000 *l.*, and expressing *Drewe's* gratitude for the liberal and generous conduct of *Charles Bidgood*, the younger, towards his Wife and their Children; and which Letters were as follows :—

London, 14th May 1797.

“ Dear Brother,

“ I have, by Monday's post, received from Mr. *Richard*, on your account, Bills, value 365 *l.* 10*s.*, which, with 720 *l.* 2*s.* the Purchase-money for your moiety of the Tithes, your Sister gives me your very generous order to lay out in Three per Cent. Consols, in the joint Names of yourself and *John Pitman*, in trust for her and our Children. I beg you will accept my grateful thanks for your kindness to them. They deserve our love, and you have the heartfelt pleasure of promoting their happiness. Enclosed, you have the Receipts for the Stock I have already bought, and hope to be able very soon to lay out the remaining Balance due for the Tithes, as I am extremely anxious that what you are now doing for your Sister shall be applied to the best advantage. If you will sign the enclosed Paper and return it to me, I shall be able to receive

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your Dividend on your Old South-Sea Annuities, as soon as the Probate of your Father's Will is sent me, or exhibited at the South-Sea House."

| £. | s. | | £. | s. | d. |
|-------|----|----------------------------------|---------------|-----|---------------|
| " 365 | 10 | remitted - - - - | bought | 745 | 18 4 Consols. |
| " 487 | 10 | part of 720 l. 2 s. per J. R. D. | 1,000 | — | — D° |
| | | | <hr/> | | |
| | | | £. 1,745 18 4 | | |

" Stock bought in the Names of }
C. Bidgood and John Pitman, in }
 trust for *Dorothy Drewe*."

London, 27th May 1797.

" Dear Brother,

" I have two Letters from your Sister, one enclosing an Order for receiving your Dividend, amounting to 64 l. 10s.; the other, with Bank Bills for 50 l. These two Sums are laid out in the Consols, agreeably to your friendly direction; and enclosed you have the Stock Receipt, and a Letter of Attorney for me to receive the Dividends, which you and Mr. *Pitman* will be so obliging as to execute. I am extremely obliged to you for your anxiety to invest a further Sum in the Stocks on this Account, which, certainly, at the present low price of the Funds, is a very great object to us if it could be accomplished. My Brother *Richard*, I am sure, will contrive to advance Money upon this important occasion. If you wish to accomplish this friendly Business before you join your Regiment, I can only express my grateful Acknowledgment for the kind part you are acting, and remain your

Affectionate Brother,

" *J. R. Drew*."

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" Dear Brother,

" I have heard from your Sister since you left *Rockbeard*; and hope this will find you safe and well with your Regiment. Finding it was your wish to provide the Money for the Funds immediately, and being informed of the difficulty of borrowing in the Country, I have applied to a Friend in Town, who is so obliging as to advance the 800*l.* on your Note, which I have inclosed for you to sign. This has enabled me to lay out the whole sum of 2,000*l.* in the Consols, in the joint Names of yourself and *Pitman*, in trust for your Sister and my Children; and the enclosed, with former Receipts, makes up the whole Sum. You see the Note is on Demand; but, should it be convenient to you to send the Money in three Months, it will make no material difference, as it will remain in the hands of my Friend."

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| | £. | s. | | £. | s. |
|-----------------------------------------------------|----|---------|-----------------|--------|---------|
| " May 12. Bills from Exon | - | 365 10 | - Stock receipt | 365 10 | |
| — — Paid for Tithe | - | 720 — | - - D° | - | 487 10 |
| — 26. Bills - - - - | - | 54 — | - - D° | - | 323 10 |
| — 27. Dividend O. S. S. A. | - | 64 10 | - - D° | - | 116 — |
| June 2. Borr ^d on C. B. Acc ^t | - | 800 — | - - D° | - | 798 8 |
| | £. | 2,000 — | | £. | 2,000 — |

" The above is a state of the Trust Account."

The Answer then set forth the Deed of August 1797, and insisted that, by the means aforesaid, the 463*l.* 15*s.* 9*d.* had been fully satisfied.

Mr. *Sugden*, and Mr. *Merivale*, for the Plaintiffs:—
It cannot be contended that the Deed of 1797 was

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made in Satisfaction of the 463*l.* 15*s.* 9*d.* That Deed recites that it was made for the natural love and affection which *C. Bidgood*, the younger, bore to his Sister and her Children, and with a view to make a Provision for them. No allusion is made to the Claim of *Mrs. Drewe* under her Father's Settlement. The Letters set forth in the Answer afford the strongest Evidence that the Settlement of 1797, was not made in consequence of any Bargain between the Parties, but that it entirely emanated from the affection of the Brother to his Sister. Besides, *Mrs. Drewe* was under Coverture when that Settlement was made, and the Rights of the Children would be materially altered by it. For, under their Mother's Settlement, they would take vested Interests on coming of Age; but, under the Deed of 1797, the whole goes to the Survivor.

Mr. Hart, and *Mr. Roupell*, for the Defendant, relied on the expressions in the Letters, and contended that it was clear, from the Plaintiffs having abstained from making any Demand upon *Charles Bidgood*, that they were conscious he intended the Settlement made by him to be a Satisfaction of the 463*l.* 15*s.* 9*d.*; and that as *Drewe* borrowed for him the 800*l.*, to enable him to make the Settlement, it could not be supposed that he meant to leave himself in a situation to be called upon for the 463*l.* 15*s.* 9*d.*

The VICE-CHANCELLOR :—

The Deed of Gift expressly states that the 4,117*l.* 10*s.* was purchased by *Charles Bidgood*, the younger, with his own Monies, and for the natural love and affection which he bore to his Sister and her Children, who had

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no immediate Interest in the 463*l.* 15*s.* 9*d.* I am, therefore, concluded from presuming that he meant, by this Gift, to pay a Debt due from his Father's Estate, whatever the probability may be in that respect.

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HILL v. REARDON.

THIS was a Bill claiming the benefit of an Award, made in favour of the Executor of *James Fanning*, by the Commissioners under the Conventions and Act of Parliament for settling the Claims of British Subjects, whose Property had been confiscated during the French Revolution.

14th and 21st
November.

Jurisdiction.
Appeal.

The material facts of the Case are fully stated in the Judgment, and in the Report of a Motion for an Injunction made in this Cause, in Mr. *Jacob's* Reports, p. 84.

No Appeal lies to the Court of Chancery from the Decisions either of the Privy Council, or the Commissioners under the Acts and Conventions for indemnifying British Subjects for the Confiscation of their Property by the French Revolutionary Government.

The only question which the *Vice-Chancellor* thought it necessary to have argued, at the hearing, was, whether the Court had any jurisdiction to alter the Award which had been made, on Appeal, by the Privy Council.

The *Solicitor-General*, and Mr. *Wakefield*, for the Plaintiff.

Mr. *Hart*, and Mr. *Simpkinson*, for the Defendant *Devereux*, the Executor of *Fanning*, and Mr. *Fonblanque*, and Mr. *Roupell*, for a Party to whom the Executor had assigned his Interest, insisted that this Court had no Jurisdiction :

1st. Because the Conventions and Act of Parliament provided that the Claims should be settled by the Com-

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missioners, subject only to the control of the King in Council ; but gave no jurisdiction to the Court of Chancery, except on one single point, which did not arise in this Case ; and the decision of the Commissioners, subject to the control of the King in Council (which had been exercised in this Case) was decisive, not merely as to whether any Claim could be made, but also as to the Right of the Party who made it.

2d. Because the Plaintiff had made no Claim within the time limited by the Conventions and Act of Parliament.

Mr. *Wray* appeared for the *Attorney-General*, who was made a Defendant in respect of a Right which would accrue to the Crown, as to a part of the Fund awarded, in case the Plaintiff was entitled.

The *Solicitor-General*, and Mr. *Wakefield*, for the Plaintiff, insisted, 1st, That the Award of the Commissioners must be considered as having decided no more than that a certain Sum was due to the Representative of Mr. *Fanning*, and not as having settled the question whether his Real or his Personal Representative was the Party beneficially entitled : that that question was now, for the first time, raised in this Suit, and could not have been properly raised or decided before the Commissioners : that the Executor must be considered as a Trustee of the Fund for the Parties, who would, in a Court of Equity, establish their Claim to it.

2d. That the Fund claimed by the Plaintiffs was already in the hands of the Court, having been paid into it by the Commissioners, under the authority of the Act of Parliament.

3d. That the Appeal to the Privy Council was only upon the question, whether there had been such a Loss sustained as gave a Claim to Compensation ; and was not intended to usurp the equitable jurisdiction of the Court of Chancery, in case the Party who had the legal title to receive the Fund could be shown to be a Trustee for other Parties.

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The VICE-CHANCELLOR :—

By the fourth Article of the definitive Treaty of Peace between England and France, concluded at Paris on the 30th of May 1814, it was stipulated that certain Commissioners should be appointed for the examination of the Claims of British Subjects upon the French Government, for the value of Property, moveable or immoveable, which had been illegally confiscated by the French Authorities since the year 1792. By a Convention, concluded between England and France in pursuance of the ninth Article of the definitive Treaty of Peace between the Allied Powers and France, made at Paris on the 20th November 1815, it is stipulated that, for the examination and liquidation of the Claims of British Subjects on the French Government, a Capital, producing an Interest of 3,500,000 francs, commencing from the 23d of March 1816, should be inscribed, as a Fund of Guarantee, in the Great Book of the Public Debt of France, in the names of four Commissioners, one half British, and the other half French ; and, by the same Convention, certain Periods were appointed for bringing forward the Claims of British Subjects, after which they were no longer to have the benefit of the Liquidation provided by this Convention.

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Certain other Conventions were afterwards concluded, between Great Britain and France, for the purpose of giving effect to the last-mentioned Convention : and, by several Commissions under the Great Seal of the United Kingdom of Great Britain and Ireland, his Majesty, the late King, was pleased to appoint certain Commissioners for the purpose of acting, on behalf of his Majesty, according to the provisions of these Conventions.

By another Convention, signed at Paris on the 25th of April 1818, for the final arrangement of the Claims of British Subjects on the French Government, it was agreed that, in order to effect the payment and entire extinction of the Capital and Interest which might be awarded to the British Subjects, there should be inscribed, in the Great Book of the Public Debt of France, a further perpetual Annuity of 3,000,000 francs, which should bear Interest from the 22d of March 1818, and should be equally applicable, with what remained unapplied of the former sum of 3,500,000 francs, under the Convention of 1815, to the payment of the Claims of British Subjects.

By 59 Geo. 3, c. 31, intituled, " An Act to enable certain Commissioners fully to carry into effect several Conventions for liquidating Claims of British Subjects and others against the Government of France," after reciting to the effect aforesaid, and that, the said Commissioners so appointed having proceeded in the discharge of their duty, they caused to be inscribed in a Register, provided by them for that purpose, the Names of all the Claimants who had presented themselves within the period prescribed by the Conventions, and they liquidated and caused to be paid to the Claimants

certain Sums, producing, in the whole, 2,945,895 francs of yearly value, deducting therefrom two per cent. on the amount of all Claims liquidated, so that in the year 1818 a Sum, producing 554,105 francs yearly revenue, still remained of the said Fund of Guarantee; it is enacted that, in order to enable the said Commissioners to complete the examination and liquidation of the Claims of such Persons who should have caused their Names and Claims to be inserted in the aforesaid Register, it should and might be lawful for the said Commissioners to apportion, divide and distribute the said sums of Money, so provided by France as aforesaid, to and amongst the several Claimants whose names are duly entered in the said Register, and whose Claims should be admitted by them in manner therein more particularly mentioned.

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By the 10th section of the Act, it was provided that, if questions should arise on the construction of these several Conventions, any Claimant dissatisfied with the judgment of the Commissioners should be at liberty to appeal therefrom to his Majesty in Council, subject to the Conditions and Restrictions therein stated: and, by the 15th section of the Act, it was further provided that, in case any Dispute should arise between any Parties interested in any such Claims, and the Commissioners should not be able to decide as to the Persons legally entitled to receive the liquidated amount, then it should be lawful for the Commissioners, under the authority of his Majesty's principal Secretary of State for Foreign Affairs, to sell so much of the Capital inscribed in the Great Book of France as aforesaid, as would be equal in amount to such disputed Claim, and to direct that the Sum arising from such Sale

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should be paid into the Bank of England, in the name of the Accountant General of the Court of Chancery, which said Court, upon Motion or Petition of any Person making Claim to such Money, should have power to decide upon such disputed Claims, and to make such Order in the premises as should seem just.

The Defendant, *James Edward Devereux*, previous to the passing of the Act of the 59th of the late King, caused a Claim to be duly entered in the Register kept by the Commissioners, as Executor of a Mr. *Fanning*, who died in 1805, in respect of moveable and immoveable Property which had been confiscated by the French Government in 1792; and, after the passing of the Act of the 59th of the late King, the Commissioners proceeded to examine his Claim, and, on the 12th of October 1819, awarded that Mr. *Fanning*, having prior to the Confiscation sued out and obtained Letters of Naturalization and Nobility in France, his Loss by Confiscation did not fall within the true Construction of the said several Conventions.

From this Judgment of the Commissioners the Defendant *Devereux* appealed to the King in Council; and, by an Order, made on the 10th of October 1820, the Award of the Commissioners was rescinded, and the Commissioners were directed to proceed to examine and ascertain the amount of the Loss sustained by Mr. *Fanning*, by such Confiscation of his Property, whereof all Persons whom it might concern were to take notice, and govern themselves accordingly. In obedience to this Order of the King in Council, the Commissioners afterwards proceeded in the Examination; and, in respect of the confiscated Property, awarded, at different times, large sums of Money to the Defendant, *Devereux*, as Executor of *Fanning*.

The present Bill was filed, on the 17th of March 1820, by *C. Hill* and *Ann* his Wife, claiming, in Right of the Plaintiff, *Ann*, to be entitled to one-half of the Sums so awarded to the Defendant, *Devereux*, upon the ground that, by the Laws of France, Mr. *Fanning* had not the Power of disposing of this Property by his Will, and that one Moiety of the Property confiscated had belonged to his Wife, who died in his lifetime, and had descended, first to the Children of the Marriage, and, through them, to the Plaintiff, *Ann*, as Heiress to her and to her Children; and, as to the other Moiety, that, *Fanning* having died without Heirs, it had devolved upon the Crown. The Bill named as Defendants, Mr. *Devereux*, and Mr. *Reardon* to whom Mr. *Devereux* had assigned his Interest, and the *Attorney-General*, and prayed the Declarations of the Court accordingly. Upon the opening of this Case, a preliminary Objection was taken, that this Court had no Jurisdiction, there being no Right of Appeal given by the 59th Geo. 3. to this Court, from the Decisions of the Commissioners. It was argued, for the Plaintiff, that the Decision of the Commissioners was, in effect, nothing more than a Judgment that those who represented Mr. *Fanning* were, as against the French Government, entitled to the Compensation awarded, and that it remained to be settled, by proper judicial Authority, who those Representatives were.

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On the hearing of the Cause, I expressed my opinion that this Court had no Jurisdiction to entertain the Question raised by the present Bill, and I continue of that opinion. Those who claim under Mr. *Fanning* in respect of the violence and injustice of the French

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Revolutionary Government, sustained a loss which was beyond the reach and remedy of any Court of Justice. The title to Relief is wholly derived from the Conventions and the Act of Parliament referred to, and is to be obtained only through those Conventions, and according to the Provisions of the Act of Parliament; and there can be no Appeal to any Court of Justice against the Judgment of the Commissioners, unless it be specially provided by the Conventions and Statute. Not only is no such Right of Appeal expressly given, but it is, by necessary intendment, plainly excluded. The 15th sect. of the 59th Geo. 3. enables the Commissioners, in case of conflicting Claims to any Compensation which they may have awarded to be paid by the French Government, to call in the assistance of the Court of Chancery to decide between the Claimants, if they think fit to do so, and the measure be sanctioned by the Secretary of State for Foreign Affairs, and the Lords of the Treasury. If the Legislature had intended that the Court of Chancery should have Jurisdiction in all cases to review the Decision of the Commissioners, with respect to the Party entitled to the Compensation awarded by them, this Provision could not have found its way into the Statute, and this Court has therefore no Jurisdiction.

In this Case, also, it does not appear that the Plaintiffs ever presented themselves as Claimants before the Commissioners, or caused their Names and Claims to be duly inserted in the Register kept by the Commissioners, within the periods prescribed by the several Conventions, so as to entitle themselves to the benefit of the Liquidation provided by the Conventions and Statute, if the Court could have entertained Jurisdiction.

Let the Bill be dismissed, but without Costs, because of the novelty and importance of the Question, and because the Defendants might have had the opinion of the Court upon the question of Jurisdiction by a Demurrer.

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STEVENS v. GUPPY.

24th Nov.

THIS Suit was instituted for the specific Performance of a Contract for the Sale of an Estate, part of which was Copyhold, and had been purchased, by the present Vendor, from one *Thomas Hickmans*. It was alleged by the Purchaser that the Father of *Thomas Hickmans* had devised this Copyhold by his Will, and that his Will ought to be produced.

Title.
Vendor and
Purchaser.

Where the Title to an Estate was derived from a Person who entered as Heir, under the impression that his Ancestor's Will was void, a Purchaser was not compelled to complete his Contract, without production of the Will, or Evidence of its Contents.

On the Title being referred to the Master, *Thomas Hickmans* made an Affidavit, in support of it, in the following words:—

“ *Thomas Hickmans* maketh Oath, and saith that he was the Owner of a piece or parcel of Garden Ground, of Free Copyhold Tenure, situate at *Cosely*, in the County of *Stafford*, held of the Manor of *Sedgely*, which this Deponent sold to *Thomas Smith*, of *Cosely*, Farmer, about the year 1806; that Deponent inherited the said piece of Ground from his Father, *Wm. Hickmans*, deceased, together with other Copyhold Premises held of the same Manor, and was duly admitted in Court to the same as Tenant to the Lord of the said Manor; that his Father made and signed some Paper as and for a Will, which was prepared and written out by one *Isaac Smith*,

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a Fender-maker, of *Cosely*, now deceased, and the Deponent took the said Paper or Will to Mr. *Brettel*, the Steward of the Manor, at the Court at which this Deponent was so admitted Tenant; and that the said Mr. *Brettel* looked at and read over the said Will, and said it was not worth a damn, and that the Deponent, as Heir of his Father, was entitled to all the said Copyhold Premises of which his Father died possessed; nevertheless this Deponent was willing and consented that *Elizabeth Hickmans*, his Sister, now deceased, should have one House, part of the said Copyhold Premises, for her Life, agreeable to the intention of Deponent's Father, expressed, as Deponent believes, in the said Paper-writing or Will, and Deponent accordingly suffered the said *E. Hickmans* to have the Rents of the said House as long as she lived; but she had no part of the Rents of the said Garden Ground, so sold by Deponent to the said *Thomas Smith*: and Deponent further saith that he cannot set forth the Contents of the said Will; for that he never saw it after the time he took it to the said Court, where he left it, as being of no use; and that the said Will was never proved in any Court whatever."

The *Master* reported in favour of the Title; upon which the Purchaser excepted to the Report.

In support of the Exception, it was contended that the Purchaser could not be compelled to complete his Contract, unless the Will was produced, if it was in existence, or proper Evidence given of its Contents, in case it could not be found; because the Will might hereafter be produced, or Evidence be given of its Contents, and the Opinion of the Steward be shown to be erroneous.

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Mr. Heald, Mr. Preston, Mr. Lovat, Mr. Romilly, and Mr. Pemberton, appeared for the different Parties.

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The VICE-CHANCELLOR:—

It is plain, from this Affidavit, that the Father of *Thomas Hickmans* had made some Testamentary Declaration with respect to this Copyhold in his Will: and a Purchaser cannot be compelled to take the Title, under *Thomas Hickmans*, without full Proof of the Contents of that Will.

Exception overruled.

THE ATTORNEY GENERAL

v.

PEMBROKE HALL.

24th Nov.

Charity.

THIS was an Information to set aside a Lease, granted in 1607, by the Wardens of *St. Bees School* to the Master and Fellows of *Pembroke Hall, Cambridge*.

A Corporation, which was bound to pay out of the Revenues of Charity Lands a certain annual Sum to a College, in the 4th of James the First conveyed to the College Lands then of that annual Value, in Satisfaction of the annual Sum.

Edmund Grindall, Archbishop of *Canterbury*, in the year 1583, under the authority of Letters Patent from Queen *Elizabeth*, appointed that Lands of the annual value of 50*l.* should be purchased and given to the Warden and Governor of *St. Bees School*, and their Successors, for ever, for the Maintenance of the said School, and for the Relief of poor Scholars going from

The Lands so conveyed, by

accidental circumstances, became of much greater Value in proportion than the Lands which were reserved by the Corporation for the other purposes of the Charity; yet the Court will not, at this day, undo an Arrangement which was fair at the time, and had the Approbation of the Executor of the Founder.

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thence to the Universities of *Oxford* and *Cambridge*: and he directed that 20*l.* should be applied for the finding of one Fellow and two Scholars in *Pembroke Hall*, in *Cambridge*, and 20*l.* to the Schoolmaster of *St. Bees*, and 3*l.* 6*s.* 8*d.* to the Usher, and 20*s.* to the Receiver, and 13*s.* 4*d.* for a yearly Dinner for the Governors; and that the Residue, together with Penalties, after Reparations and other necessary Charges, should form a Stock; and, when the Stock should amount to 80*l.*, should be employed in purchasing other Lands, of the yearly Revenue of five marks, for the Relief of another poor Scholar in *Pembroke Hall*; and, when a further like accumulation of Stock should be made, that it should be applied in the purchase of other Lands for the Relief of a poor Scholar in *Queen's College, Oxford*; and so, from time to time, as the Stock should increase and other Lands should be purchased, the Revenues should be applied for the further Relief of poor Scholars, successively, in *Cambridge* and *Oxford*.

On the 16th of June 1585, certain Lands, called *Palmer's Fields*, which then produced a clear yearly Rent of 24*l.*, were purchased and conveyed to the Warden and Governors of *St. Bees School*, to form part of those which were to produce the 50*l.* a year. On the 31st of May 1606, in the 4th year of King *James* the First, these Fields were leased, by the Wardens of *St. Bees School*, to *Reynold Gleydell*, the elder, and *Reynold Gleydell*, the younger, for 99 years, at the same Rent of 24*l.* a year. Other Lands, to the yearly value of 30*l.*, were afterwards purchased and conveyed to the Warden and Governors of the School, so as to make up the yearly sum of 50*l.* In 1594,

there appeared to be a Surplus of the Revenues of the Charity Lands in the hands of the Receiver, amounting to 40 *l.*; and that Sum, together with 26 *l.* supplied by the Executors of the Archbishop, was laid out in the purchase of other Lands, of the yearly value of 4 *l.*, for the Maintenance of another Scholar in *Pembroke Hall*.

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By an Indenture, dated the 1st of June 1607, and made between the Warden and Governors of *St. Bees School*, of the one part, and the Master and Fellows of *Pembroke Hall, Cambridge*, of the other part (and to which it appeared, by the Recitals, that *John Scott*, the surviving Executor of the Archbishop, was also a party,) reciting that the Archbishop, a little before his death, when he made his Statutes for the Government and Sustentation of one Fellow and two Scholars of the said College, did think that the Master and Fellows of the said College had not sufficient Licence in Mortmain to take to them and their Successors the 20 *l.* a year which he limited to them, and, for that reason, did appoint the Warden and Governors of *St. Bees School* to pay to them such yearly Sum; and that, since the death of the Archbishop, there had been, by consent as well of the said Master and Fellows as of the Executors of the Archbishop, a Licence in Mortmain procured, enabling the said Master and Fellows to purchase and receive, to them and their Successors for ever, Lands, Tenements and Hereditaments not exceeding the yearly value of 80 *l.*; it was witnessed that, for the better assurance of the 20 *l.* a year appointed by the Archbishop, and of the additional 4 *l.* a year produced by the Lands since purchased, the Warden and Governors of *St. Bees* did demise, unto the

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Master and Fellows of *Pembroke Hall*, the Lands called *Palmer's Fields* (so held on Lease by the *Gleydells* at 24*l.* a year), for a term of 1,000 years, thence next ensuing, at the yearly Rent of a red Rose, at the Feast of the Nativity of *St. John*, if lawfully demanded: and the Warden and Governors of the School covenanted that the 24*l.* a year, reserved by the said Lease to the *Gleydells*, should, during their term, be paid to the Master and Fellows of *Pembroke Hall*; and, after the determination of *Gleydell's* Lease, that they would, during the remainder of the term of 1,000 years, pay yearly the sum of 24*l.* to the Master and Fellows of *Pembroke Hall*, for the Maintenance of the Fellow and three Scholars in that College. The Indenture also stated that *John Scott*, the surviving Executor of the Archbishop, in order to secure, to the Fellow and three Scholars of the Archbishop's Foundation, the same Benefit, Privileges and Commodities as any other Fellows and Scholars enjoyed in that College, had agreed to pay and bestow, out of the Estate of the Archbishop, a sum of 200*l.* to the Master and Fellows of *Pembroke Hall*; and the Master and Fellows on their part, in consideration of this sum of 200*l.*, and of the said demise of the said Lands called *Palmer's Fields*, covenanted that the Fellow and three Scholars should enjoy the like Benefits, Privileges and Commodities as the other Fellows and Scholars of the College; and that they would deliver to *John Scott* a counterpart of this Indenture.

The Information was filed against the Master and Fellows of *Pembroke Hall* and the Warden and Governors of *St. Bees School*; and it stated that the Rent of the Lands called *Palmer's Fields* had increased to

the annual sum of 500*l.*, whilst the other Lands, retained by the Warden and Governors of the School, were now only of the annual amount of 124*l.* 19*s.*; and it charged that the original Lease to the *Gleydells*, and also the Lease to the Master and Fellows of the College, were both fraudulent, and that, at the time of granting the same, the Lands called *Palmer's Fields* were of much greater value than 24*l.* a year; and that, notwithstanding the Engagement, on the part of the Master and Fellows of *Pembroke Hall*, that the Scholars of the Archbishop's Foundation should have the like Benefits, Privileges and Commodities as any of the Fellows and Scholars of the College, the said Fellow and Scholars of the Archbishop's Foundation had enjoyed only certain limited Benefits, much inferior to the other Fellows and Scholars.

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It also stated that, in 1612, a Bill was filed in this Court by *John Scott* against the Warden and Governors of *St. Bees School*, touching these Leases, and that an Order was made in that Cause, on the 21st of November 1612, as follows:—"Whereas, upon the hearing of this Cause the 22d of October last, it appeared that one *Reginald Cleydall* hath gotten a Lease of some of the School Lands at an Under-rent; and, as it was then alleged, of the Master and Fellows of *Pembroke Hall*, in *Cambridge*, for 1,000 years, in Reversion of the said *Cleydall's* Lease: It is, therefore, ordered, by the *Lord Chancellor*, that a Subpœna be awarded against the said *Cleydall* to bring his said Lease into Court, to be viewed and considered of as shall be meet. And his Lordship will also be pleased to write his honourable Letters unto the said Master and Fellows of *Pembroke Hall*, to bring their said Lease into this Court, to be also seen and

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perused as shall be fit; and that such Order may be taken thereupon, touching both the said Leases, as shall be meet."

No further Proceedings appeared to have been taken in that Cause touching these Leases.

The Information prayed that the Lease to the Master and Fellows of *Pembroke Hall* might be set aside and cancelled: or, if the Court should be of opinion that it ought not to be cancelled, then that it might be declared that the Master and Fellows held it only as a Security for the payment to them of the annual sum of 24*l.*, or such further Sum as they might be entitled to, in respect of the increased Value of the Estate, in proportion with the other objects of the Charity; and that they were Trustees of the Surplus for the benefit of the Charity: and that the Fellows and Scholars of the Archbishop's Foundation might be declared entitled to the like Benefits, and put upon an Equality, in all respects, with the other Fellows and Scholars of the College.

The Master and Fellows of the College, by their Answer, denied the Fraud, and stated that the Fellows and Scholars on the *St. Bees* Foundation had always enjoyed the same Benefits, and been on the same footing as the other Fellows and Scholars; and that, so far from the other Fellows of the College having been benefited by the Archbishop's Foundation, they had, in fact, been injured by it; inasmuch as the present *St. Bees* Fellow, during the 26 years he had held the Fellowship, had been paid 938*l.* more than was produced by the Rents, Profits and Fines received for *Palmer's Fields*.

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The Information now came on to be heard.

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The *Solicitor-General*, and Mr. *Pemberton*, for the Informant.

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Mr. *Horne*, and Mr. *Simpkinson*, for the Defendants.

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The VICE-CHANCELLOR:—

It appears that, in making up the 50*l.* a year in Land according to the Archbishop's appointment, the Lands called *Palmer's Fields* were computed, by his Executors, at the Rent of 24*l.* a year only, and there is, therefore, no reason to suppose that the Lease which was granted a few years afterwards to the *Gleydells* at the same Rent of 24*l.* a year, was a fraudulent Lease. Still less can it be supposed that the Warden and Governors of *St. Bees School* would fraudulently grant to the College an undue proportion of the Revenues of the Charity, to the prejudice of their own Establishment. No motive can be assigned for such conduct: and it is plain, by the Recitals in the Lease to the College, to which the Executor of the Archbishop was a party, that the purpose of all Parties was to give to the College that proportion of benefit in Land which the Archbishop had given in Money, and which the Archbishop would himself have given in Land, if the College had, before his death, been capable of holding the Land in Mortmain. It has happened that the Land so allotted, by the Warden and Governors of the School, to the College has, from accidental circumstances, increased in annual Value in a much greater proportion than the Land which was reserved by the School: and the principal purpose of the present Information is, to undo this Arrangement and to make a new and proportionable Division between the several Objects of the Charity.

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I cannot think it the office of a Court of Equity, at the distance of more than two Centuries, to undo an Arrangement which was perfectly fair at the time between the contracting Parties, and was sanctioned with the full Approbation of the Executor of the Founder, and has become unequal only from Accidents arising out of the course of time. The Information must, therefore, in this respect, be dismissed. As to the other Point: the Fellow and three Scholars of the Archbishop's Foundation are, by the Indenture of the 4th of *James*, plainly entitled to the like Benefits, Privileges and Commodities with the other Fellows and Scholars of the College; and the Court will make a Declaration accordingly.

23d July.
23d Nov.
7 Dec.

HORN v. HORN.

*Vendor and
Purchaser.
Legacy.*

Where Legacies were charged upon the Real Estates of a Trader, and his Devisee and Executor sold part of the Real Estates before the Debts were paid; held that the Purchaser, notwithstanding the 47 Geo. 3, c. 74, was liable to see his Purchase-money applied in payment of the Legacies.

THIS was a Bill, by Legatees whose Legacies were charged upon the Real Estates of the Testator, for payment of their Legacies. Some parts of the Real Estates had been sold; and the Purchasers of those parts were made Defendants.

The Testator was, at the time of making his Will and of his Death, a Trader. He devised his Real Estates, subject to the payment of Legacies, to his Son, *Joseph Horn*, in Fee, whom he appointed his sole Executor.

Horn sold part of the Estates to one *Mackinder*, for 475*l.*; and he received 350*l.*, part of the Purchase-

money, was liable to see his Purchase-money applied in payment of the Legacies.

money, and applied 152*l.* of it in part payment of one of the Legacies charged upon the Real Estates, although, at that time, several of the Testator's Debts remained unpaid. He afterwards conveyed all his Estate and Effects (subject to the Legacies) to Trustees for the benefit of his Creditors.

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v.
HORN.

When the Cause came on, for further directions, the Court referred it to the *Master*, to inquire whether the 350*l.*, or the 152*l.*, had been duly applied, or was still applicable, to pay the Legacies charged upon the Real Estates. The *Master* reported that neither of those Sums had been duly applied, or was now applicable in satisfaction of the Legacies charged by the Testator upon his Real Estates, inasmuch as the Debts of the Testator had not been fully satisfied and paid, and inasmuch as the other Legatees had not been paid rateably with the Legatee who had been paid the 152*l.*

The Purchaser excepted to the Report. On the hearing of the exception, the question was, whether the Purchaser ought to have seen that his Purchase-money was applied in payment of the Legacies; or whether, as the Real Estate of a Trader was by the 47 Geo. 3, c. 74, subject to Debts, generally, the Purchaser was discharged from the obligation to see that his Money was applied in payment of the Legacies, as he would have been if the Estate had been charged by the Testator with payment of his Debts.

Mr. *Horne*, Mr. *Preston*, and Mr. *Spence*, for the Plaintiffs :—

The Purchaser must have looked to the Will; and he could not do so without seeing that the Legacies were expressly charged on the Estates. Ought he not then

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to have inquired whether the Legacies were paid? This Case is not within the 47 Geo. 3, c. 74. Where Debts are specified in the Will, or in a Schedule annexed to it, they are specific Charges, and the Purchaser is clearly bound to see that the Purchase-money is duly applied in discharge of them. The 47 Geo. 3. could never intend to effect so great an injustice as to put Legatees, whose Legacies are specifically charged upon the Estate, completely at the mercy of the Devisee or Trustee, who might sell the Property and misapply the Money. The Case must be decided on the general principle. The only object of the Statute was to put Simple Contract Debtors of Traders in the same situation as to his Real Estates, and to give them the same rights over it, as Specialty Creditors had at Common Law. If a Bill were filed for the Administration of Assets before the Sale took place, it would be Notice to the Purchaser, and he would be bound to see to the application of the Purchase-money, even if there were only a general charge of Debts. Lord *Thurlow* decided that, where a Bond Creditor filed his Bill before the Sale, the Land was not discharged, because it would interfere with the Administration of the Assets by the Court.

Mr. *Agar*, Mr. *Parker*, and Mr. *Duckworth*, for the Purchaser:—

If the Purchaser is not discharged in such a Case as this, it is clear that there must always be a Suit in Chancery, in order to enable a proper Title to be made to the Real Estate of a Trader; and the Act of Parliament would be nugatory. The question is, whether the Effect of the Act of Parliament is not to make the Real Estates of Traders Assets for the payment of their Debts, in the same manner as if there were a general Charge of Debts by Will. If so, then all the Rules

applicable to a general Charge of Debts by Will must have their effect, and, amongst others, the Rule that where there is a general Charge of Debts the Purchaser shall not be bound to see to the Application of the Purchase-money. Here, as in every other Case, the Debts were a Charge prior to the Legacies. They were unpaid at the time of this Sale, and, therefore, the Purchaser was not bound to see to the Application of the Money which he paid for the Estate.

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Mr. *Willis*, for a Mortgagee.

The VICE-CHANCELLOR:—

The only effect of the Statute 47 Geo. 3, sess. 2, c. 74, is to render the Heir and Devisee of a Trader liable to the same Suits in Equity, at the Suit of a Simple Contract Creditor, as they were before liable to at the Suit of a Specialty Creditor, where the Heir was bound. But the Purchaser from an Heir or Devisee being, before the Statute, bound to see to the Application of his Purchase-money in satisfaction of Legacies charged on the Land by the Devisor, notwithstanding the existence of Specialty Debts which were to be paid out of the Land, and the Statute having made no difference in this respect, the Purchaser from the Heir or Devisee of a Trader must continue bound to see to the Application of his Purchase-money in satisfaction of Legacies charged on the Land, notwithstanding the Statute by which Simple Contract Debts are also to be paid out of the Land.

The Decree directed the Purchaser to pay into Court the whole amount of his Purchase-money, with Interest at Four per Cent., and the remaining part of the Testator's Real Estates to be sold.

1825.
3d and 10th
Dec.

CONST v. BARR.

Practice.
Sequestration.

Where a Party is in Custody of the Warden of the Fleet, under Process from Common Pleas, and is detained upon an Attachment from this Court, he must be brought up by *Habeas Corpus* to the Bar of the Court, and turned over to the Warden of the Fleet, before a Sequestration can issue.

A MOTION was made in this Cause to discharge an Order for a Sequestration, for irregularity. The irregularity complained of was, that the Defendant, being in the custody of the Warden of the Fleet, under Process from the Court of Common Pleas, and detained upon an Attachment from this Court, had not, before the Sequestration issued, been brought up, by *Habeas Corpus*, to the Bar of this Court, and turned over to the Warden of the Fleet.

The *Vice-Chancellor*, upon the authority of the Cases of *Knowles v. Chapman*, 1st of May 1819, and *Dawson v. Collings*, 30th of June 1820, discharged the Sequestration.

Mr. *Wakefield* supported the Motion.

Mr. *Roupell* opposed it.

COCKBURN v. RAPHAEL.

1825.
10th Dec.

AN Executor, who had proved the Will in *India*, having returned to *England*, proved it in the Prerogative Court of *Canterbury* also, and filed a Bill in this Court for the Administration of the Assets, and for a Receiver. His Co-executor, who had resided in *India* and collected the Effects there; being dead, he now moved for the Appointment of a Receiver in *India*.

Practice.
Receiver.

The Court will appoint a Receiver in *India* of a Testator's Assets, on the Application of an Executor resident in *England*, but the Receiver must give Sureties resident in *England*.

Mr. Kindersley, for the Motion, said that he believed that the more usual course of the Court was, not to appoint a Receiver abroad, but to appoint a Receiver here, who appointed his own Agent abroad; and he mentioned ——— *v. Lindsey (a)*, where the Lord Chancellor had so done.

Mr. Hart, *amicus curiæ*, stated that the Lord Chancellor had, in several Cases, appointed a Receiver abroad, he giving security in this Country.

THE VICE-CHANCELLOR:—

Generally speaking, an Executor, who has proved the Will, cannot retire from his Duty, and apply to the Court for a Receiver; but must collect the Estate himself. But in this Case, there being assets in *India*, the Executor would be allowed the expense of an Agent to collect them; and the Appointment, therefore, is no additional Charge to the Estate: and it is reasonable

(a) 15 Ves. 91.

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that the Executor should be relieved from all responsibility with respect to his Agent, by the Court taking the Nomination upon itself.

Let the *Master* approve of a proper Person, to be nominated by the Plaintiff, to be Receiver of the Assets in *India*; such Receiver to give Sureties resident in *England*.

Reg. Lib. A. 1825. fol. 409.

16th Dec.

DACRE v. GORGES.

Partition.
Mistake.
Compensation.

Surveyors appointed to make a Partition between Tenants in Common, having, by mistake, allotted to one of them a piece of Land which belonged to him exclusively; and several of the Allotments having been sold before the Mistake was discovered, the Court decreed a pecuniary Compensation. to be made to him.

THE Plaintiff, Defendant and three other Persons, were entitled, in equal Shares, to certain Estates as Tenants in Common in Fee.

In 1809, they agreed to effect a Partition; and, for that purpose, they appointed Surveyors to value the Estates and divide them into five distinct Allotments. The whole Estates were conveyed to a Trustee; and, after the Allotments were made, they were conveyed, in severalty, to each of the Parties.

The Surveyors, in making their Valuation, erroneously included eleven Acres of Land in which the Plaintiff alone was interested, and these eleven Acres were included in the Allotment made to the Plaintiff; so that, to the extent of their Value, the Plaintiff had less of the Estate to be divided than the four other Tenants in Common.

This mistake was not discovered till the year 1820; and was then communicated to the other Tenants in

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Common, some of whom had sold considerable parts of their Allotments; so that the mistake could not be remedied by a new Partition. But all the other Tenants in Common, having made Compensation to the Plaintiff according to a new Valuation, and the Defendant alone refusing to do so, this Bill was filed to compel a Compensation in Money according to the Valuation, or to secure to the Plaintiff a sufficient Rent-charge for equality of Partition.

The Answer denied the mistake, and insisted that the Plaintiff had no Claim, against the Defendant, in respect of the matters mentioned in the Bill. The mistake, however, was clearly proved by the Evidence in the Cause.

Mr. Sugden, and Mr. Teed, for the Plaintiff.

Mr. Rolfe, for the Defendant :—

The Plaintiff is to be considered as a Purchaser of the Allotment awarded by the Surveyors; and is as much bound to see that he had a good Title to the whole Allotment, as a Purchaser is bound to see to the Title to the whole Estate purchased by him. A Purchaser has no remedy in case of eviction, unless upon the Covenants of the Vendor; and, in this Case, the Plaintiff has no protection of that kind. The Plaintiff might have entered.

Mr. Sugden, in reply :—

It is impossible to show any analogy between this Case and that of a Purchaser. In *Bustard's Case* (a),

(a) 4 Co. 121.

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it was resolved that, upon an Exchange, if one of the Parties was evicted, he should have Recompence under the Warranty implied by the Exchange; and it is added, "the same Law in case of Partition." And in Co. Litt. 174 a. it is expressly said that, in case of eviction after Partition, the Party evicted shall have Recompence. It was impossible for the Plaintiff to enter, because the mode of Partition was by conveying the whole of the Estate to a Trustee, who reconveyed to each Party his Allotment. This is a case of mistake, committed by joint Agents, and therefore is clearly a case for equitable Relief.

The VICE-CHANCELLOR:—

This is a plain case of mistake on the part of the Surveyors, against which it is the office of a Court of Equity to relieve. The common Title under which all parties Claim upon a Partition, never comes into question: and the Case put, of a Purchaser with a Defective Title, has no application here.

"This Court doth declare that the Plaintiffs are entitled, in right of the Plaintiff *Meliora Dacre*, to a Compensation from the Defendant, in respect of the one-fifth part of the piece or parcel of Land allotted to the Plaintiffs, as in the Pleadings mentioned; and it is ordered that the Defendant do pay to the Plaintiff *Meliora Dacre*, for her own separate use, the sum of 196*l.* 19*s.*, the value of such one-fifth part, with interest of four per cent per annum from the 29th day of September 1820, together with the Plaintiffs Costs of this Suit."

Reg. Lib. A. 1825, fo. 939.

CAPEL v. BUTLER.

1825.
17th Dec.

*Surety.
Parties.*

BY an Indenture, dated the 12th of July 1820, after reciting that one *White* had agreed with the Defendant *Butler* for the Sale to him of an Annuity of 150*l.*, for the Lives of himself and three other Persons, and that, upon the Treaty for the Grant of the Annuity, it was agreed that the same should be secured, not only by *White's* Covenant and a Warrant of Attorney to confess a Judgment against him for 3,000*l.* and Costs of Suit, but also by a Demise of certain Leasehold Premises, and by an Assignment of two Trows or Ships belonging to *White*, and the Proceeds and Earnings thereof, and of a certain Policy of Insurance, on the Life of *White*, for 500*l.*, to one *Pruen*, upon the Trusts therein declared: and that it was agreed that the Annuity should be further secured by the joint and several Bond of *White* and the Plaintiff, in the Penalty of 3,000*l.*: and that, in performance of the Agreement, *White* and the Plaintiff, by their Bond or Obligation in writing, bearing even date with the Indenture, became jointly and severally bound to *Butler*, in the penalty of 3,000*l.*, for securing the due payment of the Annuity; *White* covenanted with *Butler* to pay him the Annuity during the Lives before mentioned, the first payment to be made on the 12th of October then next; and he demised to *Pruen* certain Hereditaments for the remainder of a Term of 1,000 years, except the last ten days; and he also assigned to *Pruen* all that Trow or Vessel called "*The William of Gloucester*," and all that other Trow or Vessel called "*The Endeavour*," and all and singular the Masts, Sails,

If, by the Neglect of the Creditor, the Benefit of some of the Securities for the Debt is lost, the Surety is *pro tanto* discharged.

If a Person who is named as a Defendant, but has never been served with a Sub-pœna, or appeared to the Bill, appears by Counsel at the hearing, and consents to be bound by the Decree, the Defect is cured.

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Sail-yards, Anchors, Cables, Ropes, Yards, Guns, Gunpowder, Ammunition, Small Arms, Tackle, Apparel, Boats, Oars, and Appurtenances whatsoever to the said Ships or Vessels belonging, or in anywise appertaining, (which said Trows or Vessels were in the Indenture mentioned to be British-built, and respectively registered according to the Laws then in force, and the Certificates of which Registries were set forth in the Indenture,) and also the Policy of Assurance before mentioned, upon trust, if the Annuity should be unpaid for twenty-eight days after any of the days of payment, to sell all or any of the trust Premises vested in him, and to stand possessed of the Proceeds upon trust to pay the arrears of the Annuity, and to invest the Surplus in his Name, either in the Public Funds, or upon Government or Real Securities, and, out of the yearly Proceeds thereof, to keep down the Annuity, and subject thereto to stand possessed of the Capital in trust for *White*. And it was by the same Indenture covenanted and declared that if *White* should, at any time after the expiration of two years from the date thereof, give to *Butler* three calendar months notice of his intention to repurchase the Annuity, and should pay to *Butler* all Arrears of the Annuity to that day, and also 1,500*l.* as the consideration for the repurchase of the Annuity, or if, without giving such notice, *White* should, at any time after the expiration of the two years, pay to *Butler* all arrears of the Annuity, and the consideration of 1,500*l.*, together with one quarterly payment of the Annuity in lieu of such notice, then the Annuity should cease, and all the Securities for the same become void.

In pursuance of the Agreement before mentioned, *White* and the Plaintiff executed a joint and several

Bond to *Butler*, dated the 12th of July 1820, in the penalty of 3,000*l.*, in which were recited the Agreement for the Sale of the Annuity, the Indenture of the 12th of July 1820, and the other Securities.

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The formalities required by the Ship Register Acts were not complied with upon the Assignment of the Vessels; and, in November 1820, *White*, taking advantage of that omission, sold them, and applied the Proceeds to his own use.

On the 9th of April 1821, a Commission of Bankrupt issued against *White*, under which he was found a Bankrupt; and the Plaintiff and one *Payne* were chosen his Assignees.

The Annuity being in arrear, *Butler* brought an Action against the Plaintiff on the Bond.

The Bill, after stating these facts, alleged that the Plaintiff had discovered, since *White's* Bankruptcy, that *Butler* and *Pruen* had neglected to perfect the Assignment of the Trows or Vessels according to the forms, and in the mode required by the several Acts of Parliament for the Registry of Ships or Vessels, and the transfer of Property therein; and that *White* had disposed of the Trows or Vessels and applied the Proceeds to his own use, whereby the Security for the regular payment of the Annuity had been very much diminished: that the Rents of the Leasehold Premises were not sufficient to answer the growing payments of the Annuity, whereas the Earnings of the Vessels, together with the Rents, were, when the Plaintiff entered into the Bond, and would still be, if the Vessels had not been sold, sufficient for that purpose.

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CAPEL
v.
BUTLER.

The Bill prayed for an Injunction to restrain the Action: that the Bond might be declared void in respect of the Defendants not having rendered the Assignment of the Trows an effective Assignment; and that the Plaintiff might be decreed to be entitled to repurchase the Annuity on payment of the 1,500*l.*, and 35*l.* (being one quarter of a year of the said Annuity) less the value of the Trows or Vessels.

Butler and *Pruen* admitted, in their Answer, that they did not cause any Indorsement or Memorandum of the Assignment of the Trows or Vessels to be entered on the Register of the Trows or Vessels, by reason of the Counsel, who prepared the Securities for the Annuity, having advised them that no such Memorandum or Indorsement was necessary, and that the Trows were not within the Registry Act, because (amongst other reasons) they were not employed, as he considered, for any purpose beyond inland navigation on a river, the Trows only trading between *Bristol* and *Gloucester*, on the rivers *Severn* and *Avon*: and they submitted that the Plaintiff had notice of the nature of the Assignment or Conveyance which *White* had executed to them of the Trows or Vessels, and that the same were only secured or assigned to them by the Indenture of July 1820, and not by a Bargain and Sale and Indorsement on the Registry of the Trows or Vessels, inasmuch as the Bond executed by the Plaintiff referred to, and in part recited the Indenture of Assignment of July 1820.

Mr. *Fonblanque*, and Mr. *Romilly*, for the Plaintiff:—

White, having fraudulently assigned these Vssels, the question is, whether the loss is to fall on the Plaintiff,

or upon the Party who, if he had used due diligence, might have prevented the loss.

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A Creditor is a Trustee, for the Surety, of the Securities which he holds for his Debt. It appears, by the recitals of the Bond, that the Plaintiff became Surety on the faith of the Vessels being effectually assigned as a Security for the Annuity. *Lowe v. East India Company (a)*, *Mayhew v. Crickett (b)*.

Mr. Sugden, and Mr. Lynch, for the Defendants,
Butler and Pruett :—

Securities have failed before, but such an Equity as the present one has never been claimed till now. There is no such Rule as that the Grantee of an Annuity is bound to see that all the Securities for it are valid. The circumstance of there being a Surety, relieves the Grantee from the necessity of ascertaining whether the Securities are good or not. The Contract is between the Grantee and the Parties who are to give him the Securities. The latter are all Grantors; the former, the Grantee. Suppose the Title to the Leaseholds were bad, and the Equity contended for by the Plaintiff were to prevail, the very instant that the necessity for a Surety arose, he would say he was discharged. If he had intended to rely on the Securities, he was bound to see that they were valid. A Surety is entitled to stand in the place of the Creditor; but here he asks to be placed in a better situation. How can it be said that the Defendants did not use due diligence, when it appears that they took the Opinion of Counsel, who advised them that the Assignment was valid? It has often been decided that,

(a) 4 Ves. 824.

(b) 2 Swan. 185.

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where a Solicitor acts under the advice of Counsel, he is discharged from all responsibility. This has often been held when Actions have been brought against Solicitors for the defects in the Memorials of Annuities. Under these circumstances it is impossible to say the loss is to fall upon the Defendants.

The *Vice-Chancellor* was of opinion that the Plaintiff, as Surety, was entitled to take advantage of the Proviso for Redemption; and that, the value of the two Vessels being lost to him, by the neglect of the Defendant *Butler*, he was entitled to deduct that value from the stipulated price of Redemption.

Upon the Bankruptcy of *White*, the Plaintiff and one *Payne* were chosen his Assignees: and it was objected that *Payne* ought to have been a Party. *Payne* was named as a Party Defendant in the Bill; but no Sub-pœna had been served upon him, nor had he appeared to the Bill; but Mr. *Simons* appeared for him at the hearing, and consented to be bound by the Decree.

The *Vice-Chancellor* was of opinion that the objection was cured by *Payne* appearing by his Counsel, and consenting to be bound by the Decree. And his *Honor* directed that the Defendant *Butler* should be at liberty to prove, under the Commission, for the value of the two Vessels; and that the Plaintiff *Capel* should be at liberty to prove under the Commission such Sum as he should pay to the Defendant *Butler* under the Decree, and also what he had before paid for Arrears of the Annuity.

In re COLE.

1825.
23d Dec.

IN this Case, a Bill of Costs had been delivered by an Attorney to his Client. The Attorney died ; and, afterwards, the Bill was taxed against his Executrix, and more than One Sixth was deducted.

*Solicitor and
Client.
Costs of
Taxation.*

The Court was now moved that the Executrix pay the Costs of the Taxation.

Mr. *Wakefield*, for the Executrix, referred to the Case of *Weston v. Pool* (a).

If a Bill of Costs is taxed after the Solicitor's Death, his Representative will not be ordered to pay the Costs of Taxation, although more than a Sixth is deducted.

The *Vice-Chancellor* was of opinion that the Statute did not apply to the Personal Representative, and that the Executrix, being in no default, ought not to pay Costs.

(a) 2 Stra. 1056.

1826.
18th January.

REEVE v. DALBY.

Pleading.

A Suit, by Husband and Wife, against the Trustees of the latter's separate Property, cannot be pleaded in bar to a subsequent Suit by her and her next Friend against her Trustees and Husband, although the Relief prayed in both Suits is the same.

IN September 1823, *George William Reeve*, and his Wife, filed a Bill against *Thomas Dalby* and *Thomas Dunston*, who were Trustees of certain Property to which the Wife was entitled for her separate use, praying for an Account of the Trust Property; and that it might be declared that certain Deeds of Appointment, executed by the Wife, had been improperly obtained from her by the Trustees; and that those Deeds might be delivered up to be cancelled.

In June 1825, *Sarah Reeve*, the Wife, by her next Friend, filed a Bill against the Trustees, her Husband, and one *Thomas Street*, praying the same Relief as was sought by the former Suit, but charging her Husband and *Street* to be Parties to the Fraud by which the Deeds of Appointment had been obtained from her.

To this last Bill the Trustees pleaded another Suit depending in this Court for the same Cause.

Mr. *Horne*, and Mr. *Whitmarsh*, in support of the Plea:—

The Husband and Wife are not separated, but are living together; and both the Suits are conducted by the same Solicitor. No Relief is prayed against the Husband; and it would be impossible to make out any Case against him. There is no difference in the Relief

sought by the Suits; and therefore, they are, in fact, for the same Cause.

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v.

DALBY.

Mr. Sugden, and Mr. Norton, for the Bill:—

The Plea of another Suit depending cannot be supported, unless both Suits are not only for the same Cause, but between the same Parties.

The *Vice-Chancellor* overruled this Plea, stating that the first Suit was to be considered as the Suit of the Husband alone; and that a Decree of Dismission in that Suit would be no bar to the Wife.

BRISTOW v. BOOTHBY.

26th January.

BY Sir Brooke and Lady Boothby's Marriage Settlement, certain Freehold Estates, the Property of the Lady, were settled on Sir Brooke Boothby for Life, with remainder to Lady Boothby for Life, with remainder to Trustees for 500 Years, for raising Portions for the younger Children of the Marriage, with remainder to the first and other Sons of the Marriage in Tail Male, with remainder to certain other Trustees, for a Term of 1,000 Years, to raise Portions for the Daughters in default of Issue Male of the Marriage, with remainder to the first and other Sons of Lady Boothby, by any after-taken Husband, in Tail Male, with remainder to the Daughters of Lady Boothby, equally, as Tenants in Common in Tail, with remainder to the Survivor of Sir Brooke and Lady Boothby in Fee: And it was provided that, in case there should not be any Child or Children of the Marriage, or, there being such, all of them the Marriage died without Issue, to charge the Estate held that the Power is void for remoteness.

Construction.
Remoteness.
Power.

Settlement on Husband and Wife for their Lives, remainder to the Sons in Tail Male, remainder to the Daughters in Tail, remainder to the Survivor of the Husband and Wife in Fee, with Power to the Wife, if the Husband survived, and all the Children of with 5,000 l.;

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v.
BOOTHBY.

should die without Issue, and Sir *Brooke* should survive Lady *Boothby*, then it should be lawful for Lady *Boothby*, by Deed or Will, whether she should be covert or sole, and notwithstanding her Coverture, to charge the Premises with 5,000*l.*, to be raised and paid, after the Decease of Sir *Brooke* and Lady *Boothby*, and such failure of Issue as aforesaid, to such Person as Lady *Boothby* should direct, and to create a Term of Years for the better raising of such sum of Money.

There was only one Child of the Marriage, who died at the age of eight years.

Lady *Boothby* died in the Lifetime of Sir *Brooke*, having, by her Will, executed the power of charging the settled Estates with the 5,000*l.*

The present Suit was instituted, by a Person claiming under that Will, against the Heir of Sir *Brooke Boothby*, for the purpose of giving effect to that Charge. The Defendant put in a general Demurrer.

Mr. *Tinney*, and Mr. *Coote*, in support of the Demurrer:—

Any Estate or Charge limited after an indefinite failure of Issue, not inheritable under the limitations, is void for remoteness. *Lady Lanesborough v. Fox (a)*. *Jones v. Morgan (b)*. Therefore this Power is void, as being limited after a general failure of Issue, there being no limitation to the Daughters of Sons.

(a) Ca. Temp. Talb. 262; and Fearné Cont. Rem. 8th Edit. 447.

(b) Ibid. 451, and Appendix, N° III.; S. C. 1 Bro. C. C. 206.

It may be said that, in this case, the word "Issue" means "such Issue," or "Issue inheritable," but it is not so expressed, nor can it be collected from the Deed. In fact, it is impossible to ascertain whether the Parties intended that the Limitation should include all the Issue, or whether the Power should be confined to the Issue inheritable.

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—
BRISTOW
v.
BOOTHBY.

It may be also argued that there could be no Issue born whose Ancestor might not have suffered a Common Recovery and barred the Power. But there might have been a Son who might have died under twenty-one, leaving a Daughter; in which case the power could not have been barred, nor would it be exercisable until a general failure of Issue. It may be also said the Power is good in the event. But if a Power or Estate is void for remoteness, it cannot be made good in the event. *Proctor v. The Bishop of Bath and Wells* (c).

Mr. Sugden, in support of the Bill:—

In construing this Settlement, the intention of the Parties must be regarded. Their object was to give Lady *Boothby* a power of charging the Estate in the event of Sir *Brooke* surviving her, and there being a failure of Issue of the Marriage. It is impossible to put a literal construction upon the words of the Proviso; for the Power is to be exercised by her whether she should be coverte or sole. Now she must necessarily be under Coverture when she exercised the Power, as it is given to her only in the event of her Husband's surviving her.

(c) 2 H. Black. 358.

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BOOTHBY.

The Case of *Lady Lanesborough v. Fox* does not resemble this. For there the Devise was held to be void, on the ground that it could not be the intention of the Testator to exclude a line of Issue, namely, the Daughters of Sons, who were wholly unprovided for. Here all the Children are provided for by the Settlement. The eldest Son takes the Estate, and the younger Sons and Daughters have Charges upon it. Besides, *Lady Lanesborough v. Fox* has been overruled by the decision of the House of Lords in *Lord Newburgh v. Lady Newburgh* (d). That Case underwent great consideration both in and out of Court; and the House of Lords has decided that *Lady Newburgh* took, by implication, a Life Estate in the *Gloucestershire* Property, and that all the other Estates necessary to fill up the chasm must be also implied. It appears from the Cases of *Jones v. Morgan* (e), *French v. Cadells* (f), *Wellington v. Wellington* (g), and *Lytton v. Lytton* (h), that the Courts will, if possible, confine the expression "failure of Issue," to Issue living at the Testator's decease. These Cases are conclusive as to Wills.

This case is not open to any difficulty. For, suppose there had been Daughters of Sons, they would have taken nothing under the Settlement; Sir *Brooke* would have taken the reversion, and might have disposed of it as he pleased. There is no danger, therefore, if effect is given to the Proviso, of excluding any person, whom the Settlers meant to include.

(d) Not yet reported. The Case is reported upon other points in 5 Madd. 364.

(e) *Ubi sup.*

(f) 3 Bro. P. C. 257.

(g) 4 Burr. 2165; S. C. 1 W. Black. 645.

(h) 4 Bro. C. C. 441.

Now the question is, how this case varies from those we have cited; we are not seeking to alter technical words of limitation. The word "Issue," here, is not used in a technical sense; not to create a Limitation, but only to specify the event in which the Power is to arise: any language may be used for that purpose. There is no rule that is applicable to the construction of a Will, which may not be applied in construing a Clause which is to give effect to a Proviso. The intention of the Parties must guide in both cases. If then it can be inferred that the Parties to this Settlement regarded Sons of the Marriage only, what is there to prevent the Court from holding that the Settlers by the word "Issue" meant Issue inheritable under the Settlement? That word admits of modification, and the Court has power to modify it.

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Mr. Sclater, with Mr. Sugden, relied on *Morse v. Lord Ormonde* (i).

THE VICE-CHANCELLOR:—

In that part of the Instrument which creates the Power, the clear expressed intention is, that it shall only take effect upon a general failure of Issue of the Marriage; and there is no language, in any other part of the Instrument, which can authorize a Court to state that this was not the real intention of the Parties. There can be no doubt that, if it had been pointed out to the Parties that the Estate was not limited to all the Issue of the Marriage, and that the Power expressed was, therefore, too remote, the Deed would have been altered,

(i) 5 Madd. 99.

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BOOTHBY.

and that the Power and the Limitations to the Issue would have been made to correspond. But there is nothing in this Instrument which enables me to say whether this would have been effected by extending the Limitation to the Sons in Tail general, or by directing that the Power should arise upon the failure of the particular Issue of the Marriage, who were inheritable under the Settlement, as it is now framed. I am compelled, therefore, to construe the Deed as I find it, and to say that the event upon which the Power is to arise, being too remote, the Demurrer must be allowed.

24th and 31st
January.

In re LORD SOMERVILLE.

Tenant in Tail.
Stat. 39th and
40th Geo. 3.
c. 56.

Although a Fund, of which a Person is Tenant in Tail, is subject to certain Charges, the Court will, under the 39th and 40th Geo. 3, c. 56, order it to be transferred to the Tenant in Tail, after providing for the Charges.

THE late *John Lord Somerville*, by his Will, charged his Real Estates with the payment of his Debts and Legacies, in aid of his Personal Estate; and authorized his Trustees to sell the same for that purpose; and directed that, in case there should be any Surplus arising from his Personal Estate, or the Produce of his Real Estate, it should be laid out in Land, to be settled, in default of Issue of his own Body, to the use of his eldest Half-Brother *Mark*, now *Lord Somerville*, and the Heirs of his Body, with divers Remainders over.

The Trustees sold certain parts of the Real Estate, and, with the Produce thereof and of the Personal Estate, paid all the Testator's Debts and Legacies except a Legacy of 1,000*l.* (which was not payable until the Legatee attained the age of thirty-years), and four Life Annuities of 35*l.*, 50*l.*, 33*l.* and 33*l.*; and, subject

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to that Legacy and the Annuities, they invested the Surplus in the purchase of 22,733*l.* Three per Cents.

1826.

In re
LORD

SOMERVILLE

In July last, Lord *Somerville* presented a Petition to the Court, under the 39th and 40th Geo. 3. c. 56, praying that the Trustees might be declared to hold the Stock in trust for him, for his own use, discharged from the Entail and all subsequent Limitations created by his Brother's Will, but subject to the Legacy and Annuities, and might be directed to pay to him what should remain thereof, after satisfying or providing for the Legacy and Annuities. Upon this Petition, the usual order of Reference was made to the *Master*. The *Master* reported that he was of opinion that the Petitioner was not entitled to the Stock, subject to the Legacy and Annuities, under the 39th and 40th Geo. 3. c. 56; and that he did not find that there were any Charges or Incumbrances affecting it, except the Legacy and Annuities.

The Petitioner then presented another Petition, praying for the same Relief, upon the facts stated in the *Master's* Report, as was prayed by the former Petition.

Mr. *Pepys*, for the Petitioner:—

It is quite clear that Lord *Somerville* is Tenant in Tail of this Fund. The only difficulty the *Master* had was, whether the Court could deal with it so long as the Legacy and Annuities were unpaid. If, however, the Fund had been laid out in Land, the Charges upon it would not have prevented Lord *Somerville* from barring the Entail.

1826.

In re
LORD
SOMERVILLE.

Mr. *Walker* appeared for another Half-Brother of the Testator, who was the first Remainder-man.

The *Vice-Chancellor* made a Declaration and Order according to the prayer of the Petition (a).

1st February.

JACKSON and WIFE v. ROWE.

Pleading.
Purchaser for
valuable Con-
sideration
without Notice.

A Plea of Purchase for valuable Consideration, without Notice, is no Protection against an adverse Claim which the Purchaser might have had Notice of, by using due Diligence in investigating the Title.

THE Bill stated Indentures of Lease and Release, dated in September 1789, by which the late Father and Mother of the Plaintiff, Mrs. *Jackson*, limited an Estate to the use of the Father for Life, remainder to the Mother for Life, remainder to one or more of their Children as they, jointly, or as the Survivor of them, should appoint: That by an Indenture, dated in July 1799, reciting the Indentures of September 1789, and that the Father was dead without having joined with the Mother in exercising the Power, the Mother, in exercise of the Power given to her by the Indenture of Release, appointed the Estate to the use of the Plaintiff, Mrs. *Jackson*, in Fee: That, at the time of the execution of the Appointment, Mrs. *Jackson* lived with her Mother, and continued so to do until the year 1801, when her Mother intermarried with the late Father of the Defendant: that, during all such Residence, her Mother kept in her Possession the Title Deeds of the Estate, and received the Rents of it on her the Plaintiff's, account, and, from time to time, duly accounted with her for the same: That the Defendant's Father, upon his Marriage with Mrs. *Jackson's* Mother,

(a) See the 7th Geo. IV. c. 45, which repeals, but afterwards re-enacts the provisions of, the 39th and 40th Geo. III. c. 56, and also expressly provides for cases in which the Trust-moneys are subject to Charges antecedent to the Estates-tail.

took Possession of the Title Deeds, and received, and applied to his own use, the Rents of the Estate: that he died in October 1816, leaving his Wife him surviving, and the Defendant his Executor and Heir-at-Law: that the Plaintiff's Mother died in March 1824, having appointed the Plaintiff sole Executrix of her Will: That the Defendant, either as Heir or Devisee of his Father, had taken possession of the Title Deeds, and entered upon the Estate, and received the Rents of it, from the death of his Father, and still was in the receipt thereof. The Bill prayed that the Defendant might account for, and pay to the Plaintiff the amount of the Rents received both by his Father and himself; and might deliver up to the Plaintiffs the Title Deeds; and be restrained from further receiving the Rents.

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The Defendant demurred, for want of Equity, to so much of the Bill as sought either relief or discovery with respect to the Rents received, either by himself or his Father, in the lifetime of Mrs. *Jackson's* Mother. And, as to the relief and discovery founded upon Mrs. *Jackson's* Title to the Estate under the Indentures of 1789, and the subsequent Deed of Appointment, the Defendant pleaded that he had been informed and believed that Mrs. *Jackson's* Mother, before her second Marriage, and the execution of the Indentures after mentioned, pretended that she was seised in Fee, in possession, of the Estate, and was in quiet possession or receipt of the Rents and Profits thereof: that, in November 1801, a Marriage was agreed upon between Mrs. *Jackson's* Mother and the Defendant's late Father; and that, in consideration thereof, the former agreed to convey to the latter the Fee-simple of the Estates, in possession, in manner after mentioned: that, by Indentures of Lease

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and Release, dated the 18th and 19th of November 1801, after reciting that Mrs. *Jackson's* Mother was seised in Fee of the Estate, the intended Marriage, and the Agreement previous thereto, the Mother conveyed the Estate to the Defendant's Father and his Trustee, in the usual manner to bar Dower. The Plea then denied Notice, in the Defendant's Father, of any right or title of the Plaintiff Mrs. *Jackson* to the Estate, or of the Indentures of 1789, and stated the Defendant's Title to the Estate under his Father's Will, and insisted that the Father was a *bonâ fide* Purchaser of the Estate, for valuable Consideration, without Notice.

The Plea was supported by an Answer to the same effect as the Averments denying Notice.

Mr. *Hart*, and Mr. *Walker*, in support of the Demurrer, argued that, by the true effect of the Indenture of Appointment, as stated in the Bill, the Plaintiff, Mrs. *Jackson*, took no Interest in the Rents and Profits during the Life of her Mother, and, consequently, could not be entitled to any account of such Rents and Profits during that period.

The *Vice-Chancellor* was of that opinion.

In support of the Plea, they insisted that Marriage, being a valuable consideration, the Plea was a sufficient Plea of Purchase for a valuable consideration without Notice; and they cited *Wallwyn v. Lee* (a).

Mr. *Heald*, and Mr. *Tennant*, in support of the Bill.

(a) 9 Ves. 24.

The VICE-CHANCELLOR:—

I agree that the consideration of Marriage will support a Plea of Purchase for valuable consideration, equally with a Price paid in Money. But the question here is, whether the Defendant's Father was not, at the time of the Marriage, affected with implied notice of the Settlement of 1789. It must be intended, upon these pleadings, that the Title of the Plaintiff's Mother to the Estate in question depended wholly upon this Settlement; and the Defendant's Father, like every other Purchaser, was bound to use due diligence in the investigation of the Title before he accepted the Conveyance of the Estate. With due diligence he must have discovered the root of the Title; and that his intended Wife had only a Life Estate; and although he may, in fact, have been ignorant of the Settlement, according to the Averment of the Plea, yet, in Equity, he must be fixed with all the knowledge which it was reasonable he should acquire: and the Plea is therefore disproved by the implied Notice. If it were otherwise, a mere Disseisor would have a marketable Title.

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JACKSON
v.
ROWE.

If the Plea, instead of resting upon the mere assertion of the intended Wife that she had a good Title, had pleaded some Instrument, anterior to the Settlement of 1789, by which the Fee-simple had vested in her, and had averred that the Defendant's Father relied upon such prior Title, and had no notice of the Settlement, then the defence would have prevailed, because reasonable diligence on the part of the Defendant's Father could not necessarily have led to the discovery of the suppressed Settlement.

The Plea must be overruled.

1826.
20th January.

*Order.
Construction.
Month.*

CRESSWELL v. HARRIS.

BY an Order in this Cause, a month's time was given to the Plaintiff to amend his Bill.

Where an Order allowed the Plaintiff a month's time to amend his Bill: held that a lunar Month was meant.

The Order was made on the 24th of July, but the Bill was not amended until the 25th of the next month; and the question was, whether the Amendment had been made within the time allowed.

Mr. *Hart*, and Mr. *Tinney*, for the Plaintiff, contended that the Day on which the Order was pronounced was not to be taken into account, in computing the time limited by the Order; and they cited *Clayton's Case* (a), *Norris v. The Hundred of Gawtry* (b), *Castle v. Burditt* (c), and *King v. Adderley* (d).

Mr. *Agar*, for the Defendant.

The *Vice-Chancellor* held that the Order allowed the Plaintiff a lunar Month only, and that, therefore, the Bill had not been amended within the time prescribed (e).

(a) 5 Rep. 1.

(b) Hob. 139; S. C. 1 Brownl. 156.

(c) 3 T. R. 623.

(d) Dougl. 446; and see Bayley on Bills of Exch. 4 ed. 202.

(e) See *Talbot v. Linfield*, 1 W. Black. 450.

TODD v DISMOR.

1826.
20th January.

Practice.
Injunction.

THERE were three Defendants in this Cause.

An Injunction to stay proceedings at Law until Answer, or further Order, had been granted against them, as of course, and in the common form. One of the Defendants put in his Answer, and then obtained an Order *nisi* to dissolve the Injunction, suggesting that all the Defendants had answered.

The common Injunction had issued against all the Defendants; one of them filed his Answer, and then obtained an Order *nisi* to dissolve the Injunction, suggesting that all the Defendants had answered. The Order was discharged for irregularity.

The *Vice-Chancellor* discharged the Order, for irregularity, stating that, although one Defendant having answered had a right to move to dissolve the Injunction as against himself, it ought not to be suggested, in the Order *nisi*, contrary to the fact, that all the Defendants had put in their Answers.

Mr. Agar, in support of the Motion.

Mr. Heald, *contra*.

1826.
24th January.

Practice.
Exceptions.
Order of
Reference.

It is irregular to obtain one Order of Reference only, where more than one Answer is excepted to.

ALLANSON v. MOORSOM.

THE Defendant, *Moorsom*, a Bankrupt, and the other Defendants, his Assignees, put in separate Answers. The Plaintiff filed distinct Exceptions to the Answers, but obtained one Order only for referring them to the *Master*. The *Master* made but one Certificate, reporting both Answers insufficient. The Bankrupt and his Assignees filed two sets of Exceptions to the Certificate, and paid two Deposits of 5*l.* each, on setting them down.

Mr. *Koe*, for the Defendants, now moved that they might be at liberty to withdraw their Exceptions, and put in better Answers; and that the Registrar might be ordered to return to the Defendants one of the Deposits, and that the other might be paid over to the Plaintiff. He contended that, as one Report only was excepted to, one Deposit only of 5*l.* would be called for on setting down the Exceptions,

Mr. *Parker*, for the Plaintiff.

The *Vice-Chancellor* held that two Orders of Reference to the *Master* ought to have been obtained, and granted the Motion, except that he ordered both the Deposits to be paid to the Plaintiff.

Reg. Lib. A. 1825, fol. 349.

MEMORANDA.

The Case of *Morse v. Lord Ormonde*, which is cited *ante*, p. 469, and reported in 5 Madd. 99, was affirmed, on appeal, by the *Lord Chancellor*, on the 29th of April 1826.

The *Lord Chancellor's* Judgment in *The Earl of Westmeath v. The Countess of Westmeath*, lately reported by Mr. *Jacob*, p. 126, contains some observations relative to the question discussed in *Elworthy v. Bird*, *antè*, p. 372.

END OF PART III.

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

GOODENOUGH v. ALWAY.

THIS was a Tithe Suit by a Rector against the Occupiers of Land within his Parish. The Defendants set up a Modus. In a Suit of the same nature in the Court of Exchequer, between a former Rector of the Parish and other Occupiers, the latter had proved the Modus in question.

The Defendants now moved that they might be at liberty to read, at the hearing of this Cause, the Depositions in the Suit in the Exchequer.

Mr. Koe, for the Motion :—

The Court makes such an Order where the Cause in which the Depositions were taken is in the same Court as that in which they are sought to be read. *Coke v.*

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1826.
24th January
and
25th February.

Practice. Depositions.

The Court will not on Motion order Depositions, in a Tithe Cause in the Exchequer, to be read in a Tithe Suit in this Court, against other Occupiers of Land in the same Parish, though the objects of both Suits, and the interest of the Parties, were the same.

1826.
 GOODENOUGH
 v.
 ALWAY.

Fountain (a). The Depositions may be read without any Order for that purpose, if the whole proceedings in the Cause in which they were taken are put in Evidence; and the object of the Order is, to save the useless expense of proving all the proceedings.

In *Palmer v. Lord Aylesbury* (b), where the Depositions in the Cause were ordered to be read on the Trial of an Issue, the *Lord Chancellor* said that, without such an Order, the whole Record must be read; and, to save that expense, the Court ordered the Depositions to be read as Evidence.

Mr. *Treslove*, for the Plaintiff, opposed the Motion.

The VICE-CHANCELLOR:—

The Parties not being the same, the Court cannot make such an Order. If the Depositions sought to be read are, under the circumstances, legal Evidence for the Defendants, they must be proved in due form, and the Court cannot, *per saltum*, dispense with the legal proof(c).

Motion refused.

(a) 1 Vern. 413.

(b) 15 Ves. 176.

(c) In the *Mayor of London v. Perkins*, 3 Bro. P. C. 602, where a Bill was filed, in the Court of Exchequer, by the Corporation of London, to recover a Tonnage Duty, it was moved that the Depositions of Witnesses in two former Causes, by the Corporation against other Defendants, for recovering the same Duty, might be read at the hearing, the Witnesses being dead. The Court of Exchequer refused the Motion. But, on Appeal to the House of Lords, it was declared, "that the Court of Exchequer ought not to have refused to grant an Order for the Appellants to have liberty to read the Depositions taken in the two former Causes at the hearing of this Cause, saving all just exceptions."

MENDIZABEL v. MACHADO.

THE Bill was filed for a Commission to examine Witnesses abroad, and for a Discovery, in aid of an Action at Law commenced by the Plaintiff in this Suit. The Defendant having taken an Order for time to Answer the Bill, a Motion was now made on behalf of the Plaintiff, for a Commission to examine a Witness in the *Brazils*; but the Notice of Motion did not specify the Name of the Witness, or the Facts to which he was to be examined.

Mr. Sugden, and Mr. T. O. Anderdon, for the Motion.

Mr. Heald, and Mr. Russell, *contra*.

The facts of the Case, and the Authorities cited, are mentioned in the Judgment.

THE VICE-CHANCELLOR:—

In this Case an application was made, on the part of the Plaintiff, for a Commission to examine a Witness in the *Brazils*; and, of consequence, to stay the proceedings at Law until the return of such Commission. The Affidavit in support of the Motion, without naming the Witness, states only that Evidence material to the Issue in the Cause can be given by a Witness who is believed to be in the *Brazils*.

Upon the discussion of the Motion, it occurred to me to question the sufficiency of the Affidavit: for if it were enough that the Party should swear to the materiality

1826.
3d and 13th
February.

Practice.
Commission to
examine
Witnesses
Abroad.

A Motion for a Commission to examine a Witness abroad, in aid of an Action at Law, must be supported by an Affidavit, stating the name of the Witness, and the points to which he is to be examined.

1826.

MENDIZABEL
v.
MACHADO.

of the Evidence, without either naming the Witness, or the points to which it was proposed to examine him, it seemed to afford to a Party the opportunity of postponing any proceedings at Law, in which he was concerned, to an indefinite period of time, at his pleasure; and this with little danger of the penalties of perjury; because the materiality of Evidence is not a mere fact, but involves the very nicest question of Law upon which there may well be an honest difference of opinion between persons of knowledge and experience.

In support of the Application, I was referred to the Case of *Oldham v. Carleton* (a), in which it was said the Practice was settled; and to a subsequent Case in *Vesey*, in which *Oldham v. Carleton* was followed (b). The Case of *Oldham v. Carleton* was the mere expression of the opinion of the Register.

Considering the question of great importance, I adjourned the Case for further consideration. The Officers of the Court have not been able to furnish me with any authorities which are not in print. There are, however, two authorities directly opposed to the Register's opinion in *Oldham v. Carleton*. The first is reported in 1 Vern. 344; and the *Lord Chancellor* there states that the general Affidavit of having material Witnesses abroad, beyond the Sea, is not sufficient for a Commission; but the Witnesses must be named, and the points to which they can materially depose. The other authority is *Moody v. Steele* (c). There, the Reporter states

(a) 4 Bro. C. C. 88.

(b) *Rougemont v. Royal Exchange Assurance Company*, 7 Ves. 304.

(c) 2 Ans. 386.

that a Commission to India was moved for upon the common Affidavit; and Mr. Baron *Thomson* gives his Judgment in these words: "Your Bill states the affairs to have taken place in India. Your Affidavit must verify that, and show in what manner this testimony is material. We cannot put off a Trial for two years, on the common Affidavit requiring to delay it for a term. You must come again with a full Affidavit."

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v.
MACHADO.

It is plain that, by the common Affidavit, is here meant the Affidavit usually made to delay a Trial upon the absence of a material Witness, which states only that the Evidence is material, without specifying the points to which it is intended to examine the Witness.

I will now state the case of *Oldham v. Carleton*, which is relied on in opposition to the authorities I have cited. [Here the *Vice-Chancellor* read the whole Report of the Case.] This Case is nothing more than the imperfect recollection of the Register as to the Practice, in opposition to two Cases, not merely deciding a contrary Practice, but explaining the principles upon which that Practice is founded. The weight of authority, therefore, as well as the weight of principle, is against the present Application.

If, generally speaking, it be fit that the Court should judge of the materiality of the Evidence sought to be obtained by the Commission, before it consents to delay, perhaps for years, the proceedings at Law which are pending against the Party, it is more especially necessary in the present Case.

The Defendant *Machado*, under a Convention concluded, at the Restoration, between France and Spain,

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received from the French Government, and is now in possession of a Sum exceeding 300,000 *l.*, as a Trustee for such Subjects of Spain as could establish Claims against the former Government of France. In 1823, the actual Government of Spain, for the purpose of providing means to repel the Invasion of France, caused certain Bills of Exchange to be drawn upon the Defendant, in order that the Trust-money in his hands might be applied to public purposes; and, by way of compensation to the Claimants who were entitled to this Money, they appear to have directed that the Defendant's Name should be inserted in the Great Book of the Public Debt of Spain, as a Creditor for the same Sum. The Defendant refused to accept these Bills; and the Plaintiff, being the Holder of these Bills to an amount of 200,000 *l.* or some such large amount, now sues the Defendant for that Sum in this Country. And very singular questions will come to be considered in this Action: First, Whether, by the constitution of the Spanish Government, there resides any where sufficient Authority legally to transfer to the State this Trust Property, so as to relieve the Defendant from all Claims on the part of those for whom he was constituted a Trustee: and if so, Whether, secondly, the Actual Government of Spain in 1823, is, in the Courts of this Country, to be considered as the Legitimate Government of Spain: which probably would turn upon the question whether that Government was, or not, recognised by the Public Authorities of this Country; and thirdly, if by the constitution of the Spanish Government, there did reside somewhere sufficient Authority legally to transfer to the State this Trust Property; and if the Spanish Government in 1823 be to be considered in the Courts of this Country as the Legitimate Government of Spain, then, Whether that sufficient

Authority so to transfer this Property was or not exercised in due form ?

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Considering, therefore, the unusual character of the questions which will arise in this Case, it is especially necessary for the Court to be informed of the nature of the Evidence which is expected from the Witness in the *Brazils*, before it consents to delay the Trial in this Case for years, merely upon the affidavit of the Plaintiff, that he believes some person in *Brazil* can give Evidence which he, the Plaintiff, considers to be material; a point upon which he can have no sufficient means to form a sound opinion.

There seems latterly to have prevailed a notion that it was not necessary, for a Party applying for a Commission to examine Witnesses abroad, to state the Names of his Witnesses, upon the ground that it would expose his Witnesses to be tampered with. That reason is not without force: but I doubt whether the danger of imposition upon the Court, if the Party is not compelled to name his Witness, is not a greater evil than the supposed inconvenience of the contrary practice. In the Case of *Oldham v. Carleton*, it seems to have been conceded, by all parties, that the Witness must be named, and the Case in the 1st Vernon is to that effect.

The danger that naming a Witness abroad, in an Affidavit for a Commission, may expose a Witness to be tampered with, is not a sufficient reason for not naming him in the Affidavit, and specifying the points as to which he is to be examined.

I give no opinion upon the point now, because it was not argued; but I wish to apprise the Plaintiff that any objection taken on that ground to a future Affidavit will be entitled to great consideration; and he will, therefore, judge for himself as to the prudence of introducing the Name of his Witness in the subsequent Affidavit which I now require him to make.

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24th and 27th
February.

RHODES v. COOK.

*Agreement.
Parent and
Child.*

A Tenant for Life of real Estate, with remainder to his Children as he should appoint, remainder to them in fee, entered into an Agreement with a Creditor to which his Children were Parties, that the Estate should be immediately sold, and one half of the Produce paid to the Father, and the other to the Children. The Father remained in possession for seven years, and then died, without having taken any step to carry the Agreement into effect.

A Bill by the Personal Representative of the Creditor against the Children and the Representative of the Father, to have the Agreement carried into effect, was dismissed on the ground that the Father, by continuing in possession of the Estate, deprived his Daughters of the benefit of the Agreement.

IN 1812 the Defendant to the Original Bill, being Tenant for Life of an Estate, with remainder to his Children as he should appoint, with remainder to his Children in fee, mortgaged the Estate, and assigned a Policy of Insurance on his Life to the Plaintiff's Testator, to secure a sum of Money advanced to him by the latter. In November 1814 the Defendant obtained a further advance of 500*l.* from the same person, for which he gave his Bond only; but an Agreement was at the time made between him, of the first part, his two Daughters, who were his only Children, of the second part, and the Creditor, of the third part; whereby it was agreed that the mortgaged Estate should be immediately sold, that the Father should receive for his own use a clear Moiety of the Produce, and that the other Moiety should be equally divided between the two Daughters. The Father lived seven years after the Agreement was entered into, and continued during the whole time in possession of the Estate, without taking any steps to carry the Agreement into effect. After the filing of the Original Bill the Father died.

This was a Supplemental Bill by the Creditor's Executor against the Daughters and their Father's Executor, praying that the Agreement might be carried into effect, that the Estate might be sold, and that a

clear Moiety of the Produce, after satisfaction of the Mortgage Debt; might be deemed Assets of the Father, and applied in a course of Administration in payment of the Bond Debt of the Plaintiff's Testator, and of the other Creditors of the Father.

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One of the Daughters stated, in her Answer, that she had been induced to join in the Agreement because her Father had a Power of Appointment over the Estate to such one or more of his Children as he should think fit; and had threatened her to appoint the whole Estate to her Sister, if she would not join in the Mortgage. But these statements were not supported by Evidence; nor was there any Evidence that the Mortgagee was a party to any undue influence on the part of the Father.

The *Vice-Chancellor* dismissed the Supplemental Bill, with Costs, upon the ground that the Father, by continuing in possession of the Estate, had deprived his Daughters of the benefit which they were to receive from the Agreement; and, on the Original Bill, made the common Decree for a Mortgagee upon a Bill of Foreclosure, there being no Evidence to affect the Mortgagee as party or privy to any undue influence used by the Father with his Daughters. And *His Honor* stated that such undue influence was not to be inferred; and that the assistance, thus afforded by the Daughters to the Father, might either be the effect of pure affection, or, under some circumstances, might even be dictated by worldly prudence.

Mr. *Horne*, and Mr. *Wray*, for the Plaintiff.

Mr. *Sugden*, and Mr. *Hinds*, for the Defendant.

1st and 2d
March.

Legacy.
Vesting.

Legacy to A. as soon as she attains twenty-one, with Interest, is contingent, and no Interest is payable until the Legatee attains twenty-one, and then is to be computed from the end of a year after the Testator's death.

KNIGHT v. KNIGHT.

EDWARD KNIGHT, by his Will, dated the 26th of July 1803, gave to Trustees 50,000*l.* three per cent. Consols, in Trust to pay certain Annuities to his Nephews, the Defendant *John Knight*, and the Plaintiff *Thomas Knight*, and some other Persons, and then expressed himself as follows:—

“ I likewise give and devise to each of the Daughters of *Thomas Knight* lawfully begotten, as soon as they attain the Age of twenty-one years, the sum of 2,000*l.*, with Interest at the rate of five per cent. per annum, and to each of the Sons of the said *Thomas Knight* lawfully begotten, as soon as he attains the Age of twenty-one years, the sum of 3,000*l.*, with Interest at the rate of five per cent. per annum;” and he appointed *John Knight* his sole Executor and Residuary Legatee.

The Testator died on the 30th of May 1812.

Thomas Knight had several Children living at the Testator's death, and one named *Charles*, born afterwards, who were all still living, except a Daughter named *Isabella*, who died under Age. Her Father was her personal Representative. Some of the Children were Adult, others were still Infants.

The Bill was filed by *Thomas Knight*, and such of his surviving Children as were born before the Testator's death, against *John Knight*, the Executor, and *Charles*

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Knight, the Child born after the Testator's death. It charged that the Legacies were to be considered as Interests vested, immediately upon the decease of the Testator, in the Children born in the lifetime of the Testator, and living at his decease; and that *Isabella Knight's* Legacy was not to be considered as lapsed, but, on the contrary, ought to be paid to the Plaintiff *Thomas Knight*, as her personal Representative; and that he, as such personal Representative, and all the other Plaintiffs, were entitled to Interest after the rate directed by the Will, on their respective Legacies, from the death of the Testator to the respective times of the payment thereof; and that *Charles Knight*, although born after the decease of the Testator, claimed to be entitled to a Legacy of 3,000*l.* with Interest. It prayed that Interest might be computed on the Legacies of all the Children who were living at the Testator's death: that *John Knight* might be directed to pay to *Thomas Knight*, as the personal Representative of his Daughter *Isabella*, the Legacy of 2,000*l.*, and whatever should be found due in respect of Interest thereof, and to pay to such of the other Plaintiffs as were Adult, their Legacies and Interest; and that the Legacies of all the other Plaintiffs, together with whatever should be found due for Interest upon the same as aforesaid, might be paid into Court and secured for their benefit, and that a proper allowance might be made for their Maintenance.

J. Knight, by his Answer, said that, even supposing all the Children who were born in the Testator's lifetime to be entitled to Legacies on their attaining the Age of twenty-one years, yet they were not entitled to them unless they should live to attain that Age; and he submitted whether the Legacies were or were not to be

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considered as Interests vested, immediately upon the decease of the Testator, in the Children born in the lifetime of the Testator, and living at his decease; and whether any Interest was payable in respect of those Legacies until the respective Legatees attained their Ages of twenty-one years; and he insisted that the Legacy of *Isabella Knight* was to be considered as lapsed, and ought not to be paid to *Thomas Knight* as her personal Representative.

Mr. Sugden, and Mr. Lynch, for the Plaintiffs :—

As the Legacies to the Children living at the Testator's decease were to carry Interest, they vested in them immediately. *Hanson v. Graham* (a). They were Portions vested payable at twenty-one, with the Interest payable in the meantime. *Leake v. Robinson* (b), in which all the Cases as to the vesting of Legacies are collected.

Mr. Hart, and Mr. Pemberton, for the Defendant John Knight :—

Hanson v. Graham does not govern this Case, for it is clear that the Legatees in that Case took vested Interests in the Dividends of the Stock, whatever they might do in the Capital. Wherever there is an absolute gift of the Interest, it vests the Principal also. *Lane v. Goudge* (c). Sir William Grant, Master of the Rolls, in deciding that Case, adopts the distinction which governs the present one. Here there is no absolute gift of the Interest, but it is equally contingent as the gift of the Principal.

(a) 6 Ves. 239.

(b) 2 Mer. 363.

(c) 9 Ves. 225.

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Mr. *Lynch*, in reply :—

The natural construction is, that the Interest is payable in the meantime and until the Principal is to be paid; and that it is given in consequence of the postponement of the Principal. *Stapleton v. Cheele* (d).

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THE VICE-CHANCELLOR :—

The expressed Intention must prevail; and there is no gift, either of Principal or Interest, until the Daughters attain twenty-one. If the gift of the Principal had been immediate, it would have borne Interest only from the end of the year; and it cannot bear Interest from an earlier period, because the Payment is longer delayed. The Executors would not be bound to make an Investment, for the Security of the Legatees, until the end of the year.

WILSON v. MOUNT.

24th January,
and 4th April.

AMONGST the Bequests in the Will of *T. Fletcher* was one as follows :—

Legacy.

“ I give to the said *William Mount, John March*, and *Oliver Cromwell*, the further sum of 1,500 *l.*, upon Trust to lay out and invest the same, in their Names, or in the Names or Name of the Survivor of them, in the pur-

Bequest of
Money to Trus-
tees, upon Trust
to invest it in
the public
Funds, and pay
the Dividends
to *A.* until her
Marriage, and,

upon her Marriage, to transfer the Stock to her; but in case she should die unmarried, then to transfer the Stock to such Person as she should by her Will appoint; and in default of such appointment, to her Executors or Administrators. *Semble*, that she is not entitled to have the Fund transferred to her while she remains unmarried.

(d) 2 Vern. 673.

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chase of three per cent. Consols; and to pay and apply the Interest thereof, as the same shall from time to time become payable, to my Niece *A. H. Mason*, until the day of her Marriage; and, upon the Marriage of my said Niece *A. H. Mason*, I direct the said Annuities, so to be purchased with the said 1,500*l.*, to be transferred to her the said *A. H. Mason*; but in case my said Niece *A. H. Mason* shall depart this life unmarried, then upon Trust to transfer the said Bank Annuities, so to be purchased with the said 1,500*l.*, to such Person or Persons, and in such manner and form, as she the said *A. H. Mason* shall, by her last Will and Testament in writing, give, dispose and appoint the same; and, in default of such gift, disposition or appointment, then to the Executors or Administrators of the said *A. H. Mason*."

At the hearing of the Cause for further directions, on the 7th of July 1796, it was ordered that a sum of 2,035*l.* 5*s.* 6*d.* three per cent. Consols, being then of the value of the Legacy of 1,500*l.*, and Interest, should be carried over to the credit of this Cause, to an Account intituled, "The Account of *Ann Harriet Mason*;" and that the Interest should be paid to her during her life; and, on her death, any person interested was to be at liberty to apply.

A Petition was now presented by *A. H. Mason* (who continued still unmarried) praying to have the Stock transferred to her, upon the ground that the form of the Bequest gave her an absolute Interest.

Mr. *Blenman*, for the Petitioner:—

It is plain, from the words of the Will, that the Testator intended that the whole subject of the Bequest

should vest, absolutely, in the Petitioner. Two events only are mentioned: her Marriage, and her dying unmarried, one or other of which must happen; and the gift, in either case, gives an absolute Interest. In *Booth v. Booth (a)*, although there was only a direction to pay over upon Marriage, and no express transmission of the Fund in case of the Legatee dying unmarried, it was held that the Interest vested, and that the Marriage was not a condition precedent.

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Mr. Tinney, *contra*:—

The gift to the Executors or Administrators of the Lady, in case she should die unmarried and intestate, is not, necessarily, a gift of the absolute Interest to the Lady herself. The Will expressly mentions one event only, upon the happening of which the Fund is to be paid over, namely, Marriage; and that has not taken place. In *Jennings v. Gallimore (b)*, a gift to the legal Representatives of A., in default of Appointment by A. himself, was held a gift to the Representatives. *Evans v. Charles (c)* was decided upon the same principle.

Where there is a doubt whether a gift, such as this, to the Executors or Administrators, may not mean something else than a gift to the Party herself, the Court cannot safely allow the Fund to be taken out of Court. In Limitations of personal Estate there is no analogy to the Rule in *Shelly's Case*; and there is no authority that a gift of Personalty to A., followed by a gift to his Executors, vests the whole Interest in A.

The *Vice-Chancellor* said he considered that the Language of the Decree precluded him from making the

(a) 4 Ves. 399. (b) 3 Ves. 146. (c) 1 Ans. 128.

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Order prayed; and that it would be necessary to rehear the Decree; and suggested that the right of the Petitioner might be questionable; and that she ought to be well advised before she incurred the expense of a Rehearing.

6th March.

SHARP v. HULLETT.

Practice.
Dismissal.

The time for dismissing the Bill for want of prosecution being arrived, and the Plaintiff having become bankrupt, ordered that the Bill be dismissed without Costs, unless the Assignees file a Supplemental Bill within three weeks.

THE Plaintiff had become bankrupt. The Defendants being entitled, according to the usual Practice of the Court, to move to dismiss the Bill for want of prosecution; Mr. *Russell*, for the Defendants, now moved that the Plaintiff's Assignees might file a Supplemental Bill, within ten days, or that the Bill might be dismissed.

Mr. *Rose*, for the Assignees.

THE VICE-CHANCELLOR:—

If, when the Plaintiff becomes bankrupt, it were permitted to the Defendant to dismiss the Bill, in the usual course, for want of prosecution, it would necessarily subject the Bankrupt to the payment of Costs, when he has no means; which is against the general rule of this Court as to Bankrupts. And it might be attended with this further inconvenience, that the Bill might be dismissed without the Assignees knowing the fact that such a Bill was filed, and without any opportunity of judging, on their part, whether it would or not be beneficial to the Bankrupt's Estate that the Suit should be prosecuted. An Order that the Bill should be dismissed, without Costs, within a limited time, if the Assignees

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do not think fit to file a Supplemental Bill, obviates both these objections, provided the Notice of Motion is served on the Assignees. On the other hand, it is hardly reasonable that a Bill should be dismissed for want of prosecution, as against Assignees, at an earlier period than it could, according to the course of the Court, have been dismissed for want of prosecution, if the Plaintiff had not become bankrupt; for that would be to deny to the Assignees, who stand in the place of the Bankrupt, the same time for being advised as to the propriety of continuing the Suit, which was afforded to the Bankrupt; although the Assignees cannot equally be informed as to the subject of the Suit. And this may sometimes be the effect of dismissing the Bill at the end of three weeks, if the Assignees do not file a Supplemental Bill at the end of that time. It appears, however, that this objection does not apply in the present Case; because the state of the proceedings would now enable the Defendant to dismiss the Bill, for want of prosecution, if the Plaintiff had not become bankrupt. Let the Order, therefore, be made as prayed, that the Bill be dismissed, if the Assignees do not file a Supplemental Bill within three weeks; but without Costs.

When a Case occurs in which the Motion prays a dismissal of the Bill, if no Supplemental Bill be filed by the Assignees at an earlier period than could have been the case if the Plaintiff had not become bankrupt, it will be for the Court to consider what ought to be the Order which should then be made.

1826.
8th & 11th
March.

HENCHMAN v. THE ATTORNEY GENERAL.

Heir.
Devise.
Prerogative.
Escheat.

Devise of Copyhold Land in fee, upon condition that the Devisee, within One Month, pay 2,000*l.* to the Executor, to be applied for Charitable Purposes; the Testator having left no Customary Heir, and no Next of Kin: Held, that the Devisee took the Land subject to the payment of the 2,000*l.*, and that the Crown (and not the Lord of the Manor) was entitled to the 2,000*l.* by Prerogative, if Personal Estate, because there was no Next of Kin, and if Real Estate because there was no Customary Heir.

JOHN GIRLING, by his Will, devised certain Copyhold Lands to *William Henchman*, his Heirs and Assigns, upon condition that he, within one month after the decease of the Testator, paid to his Executors a sum of 2,000*l.* which he desired should be taken as part of his Personal Estate, and disposed of in the same manner. And, after giving certain Legacies, he disposed of the Residue of his Personal Estate, including the 2,000*l.*, in favour of Charities. The Testator died without any Customary Heir or next of Kin: and the questions in the Cause were, whether the Devisee took the Copyhold Estate discharged of the Condition for payment of the 2,000*l.*; and if not, whether that Sum belonged to the Lords of the Manor, or to the Crown.

Mr. *Sugden*, and Mr. *Kindersley*, for the Plaintiff, the Devisee:—

The Crown cannot have any Claim where there is a Lord of the Manor, as in this Case; and the Lord is not entitled where there is a Tenant; therefore, the Fund cannot be raised, but must sink in the Land, for the benefit of the Devisee. It must be admitted that the Case stands on the footing of a Trust; and, if on the footing of a Trust, the Case of *Arnold v. Chapman* (a) puts it out of all doubt, and makes it a Trust for the Heir; but, as there is no Heir in this Case, Claims are made on behalf of the Lords of the Manor and of the Crown. As to the Lords of the Manor, the only ground

(a) 1 Vez. 108.

on which they can claim is Escheat. The Crown has other Claims, besides what rest on the doctrine of Escheat; for it claims in virtue of its Prerogative, and on the ground of Forfeiture. The question then is, whether there could be a good claim in this Case on the ground of Forfeiture. The true distinction is, that a Claim by Prerogative, never arises where there is an Escheat, but only in the case of *bonâ vacantia*. The claim by Escheat arises only where the Crown claims *pro defectu Hæredis*. If this, then, is a Trust for the Heir, and the Crown claims for want of an Heir, it can claim only by Escheat; and that would be the only doctrine to govern this Case. But it is unnecessary to go into the doctrine of Escheat, to show that it is quite inapplicable to a Trust of Land. That was decided in *Burgess v. Wheate* (b). All claim, therefore, on the ground of Escheat, either by the Lords of the Manor or the Crown, must fail. Then there remains for the Crown the claim by Prerogative only. But Prerogative applies only to cases of Personal Estate, and where there is no Personal Representative. The Claim on that ground, therefore, must also fail in this Case. There is no case where the Crown takes by Prerogative for want of an Heir.

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Mr. Skirrow, for one of the Lords of the Manor:—

The Lord must stand in the place of the Heir. The Case is clearly a Case of Trust. In *Arnold v. Chapman*, Lord Hardwicke treated the Money as Land; and in *Burgess v. Wheate* (c), Sir Thomas Clarke, M. R., anticipated this very Case, and plainly expressed an opinion that the Trustee cannot be entitled; for he says,

(b) 1 Bla. 121; 1 Eden, 177. (c) 1 Eden, 212.

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"If the Trustee *came* into a Court of Equity, I might be of opinion that he had no right; but have no occasion at present to enter into the merits of the Defendant's Defence." The Trustee here must show that he has a better right than any of the Defendants, and must recover by force of his own right. He cannot say that the right of another is extinguished for his benefit, especially here, because that would be contrary to the principle on which he took the Estate. In *Burgess v. Wheate*, Lord Mansfield's argument is in favour of the right of the Lord by Escheat. Two Cases in particular were alluded to in the Judgments which support that doctrine; *The Duke of York v. Marsham*(*d*), and *Rex v. Holland*(*e*); and Lord Mansfield, in his Judgment, cites many Cases, and alludes to the doctrines laid down in *Craig De Feudis*, to show that the Lord is entitled where there is no Heir. In the present Case the Condition would be entered on the Court Rolls; and inasmuch as the Devisee could only be admitted upon the Condition, he could never be permitted to claim, unless through performance of the Condition. By this Record, the Devisee put himself in the situation of a Trustee; and this Court would never permit him to claim in contravention of the terms on which he was to take the Estate. Where a man takes an Estate upon a Condition, the Court will not allow him to say that he should have it on any other terms. In *Williams v. Lord Lonsdale*(*f*), it was said, by Lord Loughborough, C. that the only point decided in *Burgess v. Wheate* was, that the Crown was not entitled to come into Chancery to make the Heir a Trustee for its benefit. *Middleton v. Spicer*(*g*)

(*d*) Hard. 423.(*e*) Alleyn, 14.(*f*) 3 Ves. 752.(*g*) 1 Bro. C. C. 201.

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was a Case of Personal Property, and therefore cannot govern that now before the Court.

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Mr. *Shadwell*, and Mr. *Turner*, for another Lord of the Manor :—

At the time of the death of the Testator the Titles of all Parties had accrued, and so much of the 2,000*l.* as was not required for Debts and Legacies belonged to the Person entitled to the Land. In *Arnold v. Chapman* it was held, that the Devisee could not take. The *Master* has reported that there is no Heir. It seems, therefore, clear, as there is no Heir and no Devisee to take, that the Lord must be entitled. In *Middleton v. Spicer* there were certainly Copyholds, as well as Leaseholds; but the Copyholds were sold in the Testator's life-time. In this Case, the legal Estate must have vested in the Lord, if the Gift had not been accepted; and there could be no Equity to take it out of him.

Mr. *Wray*, for the Crown, insisted that no Case had been made out for the other Claimants, and that the Crown took by its paramount Title.

Mr. *Sugden*, in Reply :—

It is impossible that the Lord can be entitled, where there is a Tenant on the Rolls, who is subject to answer all feudal Services. A Will executed under a Power over Copyhold Estate, operates as a mere Devise under the Statute of Wills, and has no effect under the Statute of Uses. The claim of the Crown is certainly more difficult to deal with than that of the Lord. *Durour v. Molteux* (h) shows that Real Estate may be made to go

(h) 1 Vez. 320.

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as if it were Personal. There are two ways of considering the present Case: 1st, taking it as Personalty; 2d, as Real Estate. But for whom has the Court ever said, that Money directed to be applied for an illegal purpose, should be raised? Never for any one but the Heir. In *Williams v. Lord Lonsdale* (i) it was decided, that there was no Equity on the part of the Trustee, to compel the Lord to admit him. In *Rex v. Cogan* (k), the Court of King's Bench granted a Mandamus to compel the Lord to admit the legal Tenant. Suppose this to be Personal Estate, then the Case of *Middleton v. Spicer* (l) applies, subject to the material difference, that in that Case the Fund was Personalty from the beginning, and that the Right of the Crown was there established on the principle of *bona vacantia*. Lord Mansfield's Argument in *Burgess v. Wheate* (m) has been overruled, with the approbation of the whole Profession; and the Rights of the Crown cannot be now supported on the doctrines laid down in that Argument. The *Master of the Rolls*, in that Case, says (n): "Another Case is put, of a Purchase, and the Money paid by the Purchaser, who dies without Heir, before any Conveyance. Here 'tis said, if the Lord could not claim the Estate and pray a Conveyance, the Vendor would hold the Estate he has been paid for, and keep the Money too. I think the Lord could not pray a Conveyance. To say he could, is begging the question. And as to the Vendor's keeping both the Estate and the Money, it is analogous to what Equity does in another case; as where a Conveyance is made prematurely, before Money paid, the Money is considered as a Lien on the Estate, in the hands of the

(i) 3 Ves. 752. (k) 6 East, 431. (l) 1 Bro. C. C. 201.

(m) 1 Bla. 121.

(n) 1 Bla. 150.

Vendee. So where Money was paid prematurely, the Money would be considered as a Lien on the Estate in the hands of the Vendor, for the Personal Representatives of the Purchaser; which would leave things in *statu quo*."

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And so, in the same Case, Lord Northington, C. says (o), " 'Twas said, if a Mortgagor die without Heir, shall the Mortgagee hold the Land free? I answer, shall it escheat to the Crown? No; because, in that case, the Lord has a Tenant to do his Services, and that is the whole he is entitled to in Law and Equity."

Suppose that this were a case of Freehold Land, and that the Crown was the immediate Lord, it could only take in the same way as any other Lord, and could not take while there was a Tenant to do the Services. As to this being a case of Copyhold, that makes it much stronger against the Crown; for the Lord himself must die without an Heir, before the Crown can be entitled. Here the Lord cannot take, because he has a Tenant, and he cannot take Money; and the Crown cannot take, because its Claim must come behind that of the Lord. *Walker v. Denne* (p) decided that Copyholds cannot escheat to the Crown. In this Case, therefore, the disposition by Will being void, and the Money not raisable, the Devisee alone is entitled.

The VICE-CHANCELLOR:—

The Case of *Arnold v. Chapman* is expressly in point, that the Devisee of the Copyhold takes it, subject to

(o) 1 Bla. 184. (p) 2 Ves. jun. 170.

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the payment of the 2,000*l.* That proportion of the 2,000*l.* which, by the effect of this Will, would be applicable to the Charities, necessarily fails. The Lord of the Manor cannot be entitled to it, because he takes only *propter defectum Tenentis*; and here he has his Tenant, and has received his Fine upon Admittance. If there had been Next of Kin in this Case, a question might have been raised, whether the Testator did, or not, intend that this Sum of 2,000*l.* should have all the same qualities as if it had been Personal, and not Real Estate, at the time of his Death. But the *Master* having found that there were no Next of Kin, that question becomes immaterial.

The Crown by force of its Prerogative, though not by Escheat, takes it; if Real Estate, because there is no Customary Heir; and if Personal Estate, because there are no Next of Kin.

1826.
9th March.

FARMER v. FRANCIS.

Will.
Construction.

WHEN this Cause was heard before the *Vice-Chancellor*, he directed a Case to be stated for the opinion of the Court of Common Pleas, as to the construction of the Residuary Clause in the Will of *Edmund Farmer*, so far as it related to the Real Estates. That Case is reported in the 2d vol. of Mr. *Bingham's Reports*, p. 151. The Cause now came on to be heard for further directions, upon the Judge's Certificate.

It was contended, on the part of the Plaintiff, that, although the Court of Common Pleas had certified that, as to the Real Estate, the Defendants, the Infants, took vested equitable Estates in Fee Simple, as Tenants in Common, yet that it did not follow that the Personal Estate, which was comprised in the same Gift, vested absolutely in them.

The Gift of the Residue was in the following terms :—
“ And as to all the rest, residue and remainder of my Estate and Effects, wheresoever and of what nature or kind soever the same shall or may consist, at the time of my decease, both Real and Personal, as well in possession, as reversion, remainder or expectancy, I do hereby give, devise and bequeath the same, and every part thereof, unto my wife *Lucy*, and *Joshua Francis* and *John Hemmons*, to take and hold the same, and every part thereof, unto my said Wife, and the said *Joshua Francis*, and *John Hemmons*, their Heirs, Executors, Administrators and Assigns for ever, upon Trust,

Residuary Devise of Real and Personal Estate to all the Issue, Child or Children of *M. F.* as should be alive at the time of the decease of the Survivor of two successive Tenants for Life, equally amongst them, if more than one, to be divided share and share alike, when and as they should respectively attain the age of Twenty-four years, and to their respective Heirs, Executors, Administrators and Assigns for ever, as Tenants in Common; Held, that the Children living at the death of the Tenants for Life, took absolute vested Interests in the Personal, as well as in the Real Estate.

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nevertheless, and to and for the persons, uses, intents and purposes following; viz. upon Trust, as to the Rents, Dividends, Interest, Use, Produce and Profits thereof, for the use and benefit of my said Wife, for and during the term of her natural Life, and, from and after her decease, upon Trust for, and I do hereby give, devise and bequeath the Rents, Dividends and Interest, Use, Produce and Profits of the said last-mentioned Trust Estate, Funds and Effects, unto my Daughter, *Mary Francis*, for her natural Life, to and for her own, sole, separate and peculiar use, not subject or liable to the Debts, Receipts or Engagements of her present or any after-taken Husband or Husbands, and over which I will and direct he or they shall have no power or control whatsoever, but that the Receipt of my said Daughter alone, notwithstanding her Coverture, shall be, at all times, a good and sufficient Discharge to the person or persons paying the same; and, from and after the decease of them my said Wife and Daughter, upon Trust for, and I do hereby give, devise and bequeath the said residuary Trust Estates, Hereditaments and Premises, and the Principal of the said Residuary Trust Fund, Property and Effects, unto and amongst all and every the lawful Issue, Child or Children of my said Daughter, *Mary Francis*, as shall be living at the time of the decease of the Survivor of them my said Wife and Daughter, equally amongst them, if more than one, to be divided share and share alike, when and as they shall respectively attain the age of Twenty-four years, and to their respective Heirs, Executors, Administrators and Assigns for ever, to take as Tenants in Common, and not as Joint Tenants, and, if only one, then the whole thereof to such only or surviving Child of my said Daughter, *Mary Francis*, his or her Heirs, Executors,

Administrators or Assigns for ever, upon attaining the said age. But, in case there shall be no such Issue, Child or Children of my said Daughter, *Mary Francis*, living at the time of the decease of the Survivor of them my said Wife or Daughter, or, being such, all shall die without lawful Issue under the said age of Twenty-four years, then upon Trust for, and I do hereby give and bequeath the said residuary Trust Estates, Hereditaments and Premises, residuary Trust Fund, Property and Effects, unto my Sons, *Edmund* and *Titus Farmer*, equally to be divided between them, share and share alike, and to their several and respective Heirs, Executors, Administrators and Assigns for ever, to take as Tenants in Common, and not as Joint Tenants, and to and for no other use, intent or purpose whatsoever."

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Mr. *Agar*, for the Plaintiffs, cited *Leake v. Robinson* (a), and *Gilmore v. Severne* (b).

Mr. *Sugden*, and Mr. *Combe*, for the Children, cited *Doe v. Moore* (c).

Mr. *Pepys*, for the Executors.

Mr. *Turner*, and Mr. *Girdlestone*, junior, for other Parties.

The VICE-CHANCELLOR:—

There are, certainly, Cases in which the same words have a different effect as applied to Real and to Personal Estate. But such Cases do not bear upon the present Will.

(a) 2 Meriv. 363 (b) 1 Bro. C. C. 582. (c) 14 East, 601.

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FARMER
v.
FRANCIS.

In this Case the residuary Real and Personal Estate are given unto and amongst all and every the lawful Issue, Child or Children of the Testator's Daughter, *Mary Francis*, as should be living at the time of the decease of the Survivor of them his Wife and said Daughter, equally amongst them, if more than one, to be divided share and share alike, when and as they should respectively attain the age of Twenty-four years, and to their respective Heirs, Executors, Administrators and Assigns for ever, to take as Tenants in Common, and not as Joint Tenants. The Court of Common Pleas has certified that the Children of the Testator's Daughter, *Mary Francis*, who were living at the death of the Survivor of the said Wife and Daughter, took Estates in Fee, as Tenants in Common in the Real Estates of the Testator; and, as to the Personal Estate, they plainly take absolute, vested Interests; the time of division only, as, in common cases, the time of payment, being postponed until they attain the ages of Twenty-four years.

1826.
14th March.

VANSANDAU v. MOORE.

Practice.
Answers.

THE Plaintiff was a Shareholder in a Joint Stock Company, called "*The British Annuity Company*;" and, on the 14th of May 1825, filed his Bill against the Directors of the Company, praying for an Account and a Dissolution of the Concern. Fourteen of the Directors appeared to the Bill by Mr. *John Wilks*, jun. as their Solicitor, and filed fourteen separate Answers to the Bill; to each of which a long Schedule was annexed. Each of the Answers and Schedules appeared to be, almost *verbatim*, the same.

The Court was now moved, on behalf of the Plaintiff, that it might be referred to one of the *Masters* to inquire if these fourteen Answers were substantially, or in any and what respects, different; and whether there was any and what sufficient reason for such fourteen Defendants, or any and which of them, so answering separately: And if the *Master* should find that there was a sufficient reason for the said fourteen Defendants, or any of them, answering separately, then to inquire whether there was any and what sufficient reason for repeating the Schedule annexed to each of the Answers; and that, for the purpose of those inquiries, the fourteen Defendants might be directed to furnish the *Master* with Copies of such Answers.

The Plaintiff (who was a Solicitor) stated, in his Affidavit in support of the Motion, that he had examined and compared the fourteen Answers and Schedules, and found that they were all of them alike, and nearly *ver-*

Fourteen Directors of a Joint Stock Company, against whom a Bill was filed by a Shareholder in the Company for an Account and Dissolution of the Concern, having filed fourteen separate Answers with long Schedules to each; each of the Answers and Schedules being, nearly *verbatim*, the same, and the Defendants appearing all by the same Solicitor, who had threatened to ruin the Plaintiff by the Costs of the Suit; the Court directed a Reference to the *Master*, to ascertain whether it was necessary or expedient, with a view to the Defence, that separate Answers should have been filed.

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v.
MOORE.

batim copies of each other ; and that they in no respect materially differed from each other, but appeared to have been prepared from one draft only ; that although all of them were sworn in *London*, and several of them on the same day, and all, except one, in the month of August, yet that each of the Defendants had answered separately ; that each of the Answers consisted of 627 folios, amounting altogether to 8,778 folios ; and that the Schedules to each Answer consisted of 423 folios ; and that the Charge for Office Copies of the fourteen Answers would amount to 365*l.* ; that *Wilks*, as well as many of the fourteen Defendants, had declared that their sole object in putting in separate Answers to the Bill, was to increase the Expenses of the Suit, and thereby to deter the Plaintiff from further prosecuting it ; that, as evidence of this intention, *Wilks*, in reply to a Letter written to him by the Plaintiff, remonstrating on the vexatious conduct pursued on behalf of the Defendants, wrote to the Plaintiff a Letter, of which a part was in the following terms :—

“ As your Suit is frivolous, absurd and vexatious ; as you have no more to do with the Company and its concerns than an inhabitant of Ethiopia, and as the Costs must ultimately ruin you, even to beggary, and, therefore, in the end, some of them, at least, fall upon the Company, I shall oppose, for myself and for my Clients, your ridiculous and contemptible Suit, by every legal means.”

The Affidavit also stated, that *Wilks* had, without any sufficient or proper reason, and solely for the purpose of multiplying the Costs of the Suit, taken out 47 separate Orders for Time to answer, for the several

Defendants, and that the Answers had been prepared by *Wilks*, for the same purpose, and were not prepared upon the Statements and Instructions of the Defendants themselves. It then set forth several Facts and part of a Correspondence as to the Answer of one of the Defendants, to whom a Copy of an Answer, similar to those of the other fourteen Defendants, had been sent by *Wilks*, but which that Defendant refused to adopt.

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VANSANDAU
v.
MOORE.

Mr. Heald, *Mr. Pepys*, and *Mr. Knight*, in support of the Motion :—

This is, certainly, a Motion quite novel in its nature ; but, if the practice, which has compelled the Plaintiff to come to the Court for some protection against the oppressive course of defence which has been pursued in this Case, is to prevail, it must become quite impossible for the Sutor, unless he is very rich, to prosecute his Cause at all. The Case made by the Bill is not against the Defendants, as individuals, but against the Company collectively, and against the Defendants collectively, as the Directors of the Company. The course now complained of is pursued for the deliberate purpose of harassing and impeding the Plaintiff in the prosecution of the Suit ; for it is to be observed that the mode in which *Mr. Wilkes's* Letter states it to be his intention to ruin the Plaintiff, is not by the decision of the Court, but to make it impossible for him to go on, by reason of the Expenses which will be heaped upon him by the manner of conducting the Defence.

Mr. Hart, *Mr. Shadwell*, and *Mr. Wakefield*, for the Defendants :—

The Plaintiff should come with clean hands into Court. His Bill is an attempt at extortion. He persisted

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in going on with his Suit, even after being distinctly offered all that he could ask. The Bill calls upon the Defendants to answer, "severally and respectively, upon their several and respective oaths." How then can the Plaintiff ask to be indemnified against the consequences of that which his Bill expressly requires from the Defendants? There is no Rule of the Court to compel Defendants to answer jointly. The signature of Counsel is sufficient sanction for the Court as to the propriety of the mode of defence, and is enough to bind the Court in that respect. No doubt, when the Case comes on to be heard, the Court may then consider the manner in which the Defence has been conducted, and inflict Costs, if there has been any proceeding which turns out to be unjustifiable or oppressive.

The VICE-CHANCELLOR :—

Fourteen Defendants, having a common interest, and appearing by the same Solicitor, think fit to file fourteen separate Answers, of great length, and almost in the same words, not for any purpose of expediency, with a view to the defence of any of the Parties, but solely for the purpose of impeding the Plaintiff in the prosecution of the Suit. It is plainly the duty of the Court to check such conduct. It is of no avail to say, that the Bill is itself absurd and vexatious. This is not the proper time for inquiring into the nature of the Bill. Whatever it is, the Defence to it should be fairly and properly made. I cannot, however, adopt the terms of the Notice of Motion. But I shall make an Order for a Reference to the *Master* to inquire whether, with a view to Defence in the Cause, it was necessary or expedient, on the part of the fourteen Defendants, or any and which of them, who have filed their Answers, through the intervention

of Mr. *Wilkes*, as their Solicitor, that separate Answers should be filed by each Defendant; and, if the *Master* should, as to any of the Defendants, find that it was not necessary or expedient, with a view to their defence, to put in separate Answers, then let the *Master* inquire how it happened that such separate Answers were put in; and let the *Master* be at liberty to state any matter specially at the request of any party.

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MOORE.

On Appeal to the *Lord Chancellor* this Order was reversed.

HASKER v. SUTTON.

15th March

THIS was a Suit, by the Vendor against the Purchaser of an Estate, to compel a completion of the Purchase. The Title having been objected to, the *Vice-Chancellor*, at the hearing of the Cause, directed a Case to be stated for the opinion of the Court of Common Pleas, as to the Estate which the Plaintiff had in the Property. The Judges certified that the Plaintiff had an absolute Estate of inheritance, in Fee Simple (a). Upon the Cause coming on for further directions the *Vice-Chancellor* concurred in opinion with the Judges. But the Defendant's Counsel objected that, as the Title was founded on the destruction of Contingent Remainders, the Court would not decree a Specific Performance of the Contract. The *Vice-Chancellor* said that he was ready to hear the Defendant's Counsel argue in support of their objection. But upon the Case of *Kean v.*

Vendor and
Purchaser.

Specific Performance decreed, although the Vendor's Title was founded on the destruction of Contingent Remainders.

(a) See 1 Bing, 500.

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v.
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Corbett (b) being mentioned, in which the *Lord Chancellor* had expressed a strong opinion in favour of a Title similarly circumstanced, but had made no Decree, owing to the Purchaser having become insolvent, the Defendant's Counsel withdrew their objection, and *His Honor* decreed a Specific Performance, without Costs.

Mr. Preston, and Mr. Barber, for the Plaintiff.

Mr. Sugden, and Mr. Pemberton, for the Defendant.

(b) Not reported.

15th March.

Certiorari.

Plaintiff had removed the Proceedings in a Replevin from a County Court in *Wales* to the Court of Great Sessions, and then applied to this Court for a *Certiorari* to remove them into the *King's Bench*; the Court granted the Writ, without requiring the Plaintiff to show any special ground for it.

EDWARDS v. BOWEN.

THE Plaintiff commenced a Replevin in a County Court in *Wales*, in which his Title to the Inheritance would have come in question, and afterwards removed the Proceedings into one of the Courts of Great Sessions, by the writ of *Recordari facias loquelam*. He now applied to this Court for a *Certiorari* to remove the Proceedings into the Court of King's Bench.

Mr. Knight and Mr. Chilton, in support of the Motion, cited *Zinck v. Langton (a)*, *Rex v. Eaton (b)*, *Rex v. Jukes (c)*, *Jones v. Davies (d)*, *Patterson v. Eades (e)*.

Mr. Wakefield, *contrá*, said that the Cases cited did not apply; that a *Certiorari* did not lie in such a Case

(a) Doug. 721. (b) 2 T. R. 89. (c) 8 T. R. 548.

(d) 1 Barn. & Cress. 143. (e) 3 Barn. & Cress. 556.

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as the present, or lay only upon sufficient ground being shown to the Court, which had not been done here; that the Plaintiff had preferred the most inconvenient mode of trying his right to the Freehold, one which compelled him to try it in *Wales*, and then complained that he was forced to try it there.

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EDWARDS
v.
BOWEN.

The VICE-CHANCELLOR:—

In the text-writers there is no qualification stated as to the right of the Plaintiff to the writ of *Certiorari* in all cases; and the Subject is not to be deprived of a beneficial Writ in the particular case, merely because he is not prepared with a Precedent precisely in point. If, however, it be necessary for the Plaintiff here to lay a special ground for the Writ, it is a sufficient ground that, in all other cases, the Plaintiff has an election to proceed either in the superior or inferior Court; but, in Replevin, the Action must commence in the Sheriff's Court (a).

(a) See Mitf. 40, and Cases there cited.

1826.
17th March.

HIGGINSON v. BARNEBY.

Will.
Power.
Settlement.

A Will directed a Settlement to be made of Real Estate on *A.* and his first and other Sons, in Tail, with Powers of Join-turing, Leasing, Sale and Exchange, and all other Clauses, Powers and Provisoes usually inserted in Settlements of the same kind: Held that these last words did not authorize the insertion of a Power to charge with Portions.

WILLIAM HIGGINSON, Esquire, devised all his Real Estates to Trustees, upon Trust, from time to time, until one of the younger Children, after named, of his Niece, *Elizabeth Barneby*, should attain his age of Twenty-two years, and until a Conveyance of his Estates should be made and executed as after directed, to receive the Rents Issues and Profits of his Estates, and also of the Estates after directed to be purchased with the clear residue of his Personal Estate, and apply so much thereof as his Trustees should deem necessary in the repair and keeping in order his Estates, and in payment of the Maintenance after directed, and to invest the residue of the Rents, Issues and Profits in the purchase of other Real Estates: And he directed that when his Great-nephew *Edmund Barneby*, the third Son of *Elizabeth Barneby*, should attain the age of Twenty-two years, the Trustees should convey all his Estates, and all other the Lands and Hereditaments by his Will directed to be purchased, unto his Great-nephew *Edmund Barneby*, and his Assigns, for his natural life, without impeachment of Waste, with remainder to Trustees to preserve contingent remainders, with remainder to the use of the first and other Sons of *Edmund Barneby*, successively, in tail general; with remainder to *William Barneby*, the second Son of his Niece *Elizabeth Barneby*, for his life, with remainder to Trustees to preserve contingent remainders; with remainder to the first and other Sons of *William Barneby* successively in tail general; with remainder to the Testator's own right

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Heirs : And the Testator directed that in the Settlement should be contained a Power for his Great-nephews respectively, when in the actual possession of the Hereditaments and Premises thereby devised and directed to be purchased, but not otherwise, to charge the same Hereditaments, or any competent part thereof, with any Sum by way of Jointure to a Wife, upon his Marriage, in the proportion of 100 *l.* per annum for every 1,000 *l.* fortune he might receive with his Wife, to the extent of 500 *l.* per annum, being the only Charge then existing or made under such Power ; and if a second or after Charge should be made, such second or after Charge not exceeding 250 *l.* per annum, until the former Charge for Jointure should be at an end : And his Will also was that in the Settlement should be contained a Power to the Trustees of his Will, to sell or exchange any part of the Hereditaments thereby devised or to be purchased under the Trusts of his Will ; and also a Power for the Persons in possession of the Lands and Hereditaments thereby devised and to be purchased, and for his Trustees in the meantime, to lease the same for twenty-one years, in possession, at rack-rents : and that there should also be contained in such Settlement all other clauses, powers and provisoes as are usually inserted in settlements or deeds of that kind. And he gave and bequeathed the residue of his Personal Estate to the same Trustees, in trust to invest the same in purchases of Real Estate, to be conveyed to his Trustees, or to such Person as they should appoint, to, for, and upon the same uses, trusts, intents and purposes, and under and subject to the same limitations, powers, restrictions, conditions and agreements as were thereinbefore limited and appointed concerning his Estate thereinbefore devised.

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BARNEBY.

The Rents of the Estates devised by the Will, and purchased after the Testator's death, produced 3,740 *l.* per annum; and the Interest of the residuary Personal Estate, and the accumulations of the Rents of his Real Estates, not then invested in the purchase of Real Estates, amounted to 7,600 *l.* per annum, making a total Income of 11,340 *l.* per annum.

Edmund Barneby having attained Twenty-two, and a Settlement having been prepared in pursuance of the Will, a question arose, upon a Petition presented by him, Whether the Will authorized a Power to charge the Estate with Portions for younger Children to be inserted in the Settlement?

Mr. *Horne*, and Mr. *Phillimore*, for the Petitioner, contended that the direction that there should be contained in the Settlement all such other Clauses, Powers and Provisoes, as were usually inserted in Settlements of that kind, did authorize the insertion of such a Power.

The *Vice-Chancellor* was of opinion that, under these words, the Court had no authority to insert in the Settlement a Power to appoint Portions to younger Children; because the effect of such a Power would be to diminish the Estate, which was expressly limited in strict Settlement; and because there was no certain rule as to the quantum of such Portions, by which the Court could be guided. He considered the words as referring to usual and necessary Powers of Management.

BENSLEY v. BURDON.

BY Indentures of Lease and Release of the 27th and 28th days of February 1803, made between *Francis Tweddell* of the first part, *John White* of the second part, and *Peter Tahourdin* and *Gilbert Tahourdin* of the third part, after reciting that *Francis Tweddell*, under the Will of his Grandfather, was entitled to a Remainder in Fee, expectant upon the determination of the Life Estate of his Father, *Francis Tweddell*, in certain Real Estates therein described, *Francis Tweddell* the Son, in consideration of 2,200*l.*, granted to *White* an Annuity of 264*l.*, and charged the same upon the Real Estates to which it was recited that he was entitled, with the usual powers of Entry and Distress thereon after the death of his Father: And, for more effectually securing this Annuity, he conveyed to *Peter Tahourdin* and *Gilbert Tahourdin*, and their Heirs, " All that the Reversion or Remainder in Fee expectant and to take effect upon the decease or other sooner determination of the Estate for Life of the said *Francis Tweddell* the elder, and all other the contingent and reversionary Estate, Title and Interest of him the said *Francis Tweddell* the younger, of and in, &c." (describing the Real Estates mentioned in the recital) upon Trust (in case the Annuity should be nine months in arrear) to sell the same, and thereout to pay all Arrears, and to invest the Surplus in the purchase of Stock, and apply the Interest and Dividends of such Stock from time to time in payment of the Annuity. And the Indenture of Release contained a Covenant on behalf of *Francis Tweddell* the Son, for further assurance.

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24th February
& 13th April.

*Estoppel.
Lease and
Release.*

A Conveyance by Lease and Release will operate as an Estoppel; and where the Releasee can have the benefit of the Conveyance at Law, this Court will not interfere in his behalf.

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v.
BURDON.

By other Indentures of Lease and Release of the 23d & 24th of January 1804, made between *Francis Tweddell* the younger of the first part, *Alexander Burdon* of the second part, and *Edward Mammatt* and *Andrew L. Sarel* of the third part, after a recital as to the *Tweddells* interest in the Real Estates, similar to that contained in the preceding Deed, and also a recital of the Annuity granted by that Deed, the Defendant *Francis Tweddell*, in consideration of a Sum of 4,200 *l.*, granted an Annuity of 700 *l.* a year to the Defendant *Alexander Burdon*, and charged this Annuity in like manner upon the Estates, and conveyed the Estates (expressly subject to the Annuity of 264 *l.* charged upon them by the first-mentioned Deed) to the Defendants *Mammatt* and *Sarel*, as Trustees for the Defendant *Burdon*, with a Power of Sale, and a direction as to the application of Purchase Money, similar to those contained in the first-mentioned Deed.

These Estates had been devised to *Francis Tweddell* the Father, for life, with remainder to his first and other Sons in tail. The Defendant *Francis Tweddell* was the second Son. In the year 1793, the eldest Son, having attained his age of Twenty-one years, concurred with the Father in suffering a Recovery and declaring Uses, under which, at the time when the Annuity Deeds were executed, *Francis Tweddell* the Father had an absolute power over the whole Fee Simple of the Estates, the elder Brother being then dead without Issue, and *Francis Tweddell* the Son had no interest whatever in them. In 1805 the Father died, having, by his Will, devised to the Defendant *Francis Tweddell* an Estate for Life, without Impeachment of Waste, in part of the Estates in question.

The Defendant *Francis Tweddell*, soon after the death of his Father, conveyed all the Real Property which he derived under the Will of his Father, including his Life Estate before mentioned, to the Defendant *A. Burdon*, upon Trust to sell the same, and out of the Produce to retain 6,987*l.*, which was mentioned to be due to him from the Defendant *Francis Tweddell*, and which was partly made up of the Arrears of the Annuity, and the Money paid by *Burdon* for the purchase of it.

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BURDON.

In 1815 *White* became a Bankrupt.

The Bill was filed by his Assignees against *Burdon* and the Trustees of both the Annuity Deeds. After stating the various facts already mentioned, it charged, amongst other things, that, although the Defendant *Tweddell* had not, at the time of granting the Annuities, the Estate which he represented, yet that he was estopped from saying that he had not such Estate, as a reason why the Annuity granted to *White* should not be charged upon that part of the Estates comprised in the Annuity Deeds, to which he had become entitled as Tenant for Life. It also charged that the Defendant *Burdon* gave no Consideration for the Conveyance of the Life Estate; and that the sum of 6,987*l.*, which was the pretended Consideration for that Conveyance, consisted merely of the 4,200 *l.*, the Consideration Money for the purchase of *Burdon's* Annuity, together with Arrears of that Annuity.

It prayed that it might be declared that the Life Interest in that part of the Estates devised to the Defendant *Tweddell*, was chargeable with the Annuity granted to *White*, and that the Conveyance of the Life

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v.
BURDON.

Estate to *Burdon* was void as to the Plaintiffs, or was subject to *White's* Annuity; and that a proper Deed might be executed by all necessary Parties, for charging *Tweddell's* Life Estate with that Annuity, and conveying that Estate to Trustees for that purpose; and that an Account might be taken of the Arrears of that Annuity, and of the Rents and Profits of the Estates, since the death of *Francis Tweddell* the Father, which had come to the hands of *Burdon*, and that he might be compelled to pay to the Plaintiffs what should be found due upon taking that Account, in satisfaction of the Arrears of *White's* Annuity.

The most material facts were admitted by the Answer; but *Burdon* denied that the Sum of 6,987 *l.* arose entirely in respect of the Annuity granted to him by the Defendant *Tweddell*.

Mr. *Sugden*, and Mr. *Cooper*, for the Plaintiff:—

To the extent of securing the Annuity, the Deeds of February 1803 operate by way of estoppel. But, whatever be their operation at Law, it is quite clear that, if a person assumes to sell an Estate in which he has then no interest, and he afterwards acquires an interest, this Court would, on a Bill being filed against him by the Purchaser, compel him to execute a Conveyance. And it is equally clear that a Purchaser from him, with notice, would stand in the same situation as the Vendor.

In the present Case as the 6,987 *l.* was a mere substitution for the Annuity, if the equity was good against *Francis Tweddell* the younger, it is good against *Burdon*; especially as he claims subject, expressly, to *White's*

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Annuity. *Edwards v. Rogers* (a); *Trevivian v. Lawrence* (b); the Judgment of L. Kenyon, C. J. in *Goodtitle v. Morse* (c); *Whitfield v. Fausset* (d); *Wright v. Wright* (e); and the Judgment of Eyre, C. B. in *Morse v. Faulkner* (f), and *Smith v. Law* (g). *Si alienum fundum vendideris, et tuum postea factum petas, hac te exceptione recte repellendum. Si a Titio fundum emeris qui Sempronii erat, isque tibi traditus fuerit, pretio autem soluto Titius Sempronii hæres extiterit et eundem fundum Mævio vendiderit et tradiderit, Julianus ait æquius esse priorem te tueri* (h).

Mr. Heald, and Mr. Ellison, for the Defendant,
Burdon :—

The object of this Bill is to compel a specific performance of the Covenant for further assurance. Now the Court will not enforce the specific performance of a Covenant by an expectant Heir, for a sale of his Expectancy. *Johnson v. Nott* (i). The right of a Purchaser, who has got a defective Title, to file a Bill for relief under the Covenant for further assurance, is a qualified one (k). It is consistent with the Pleadings that *F. Tweddell* the Son, when he granted the Annuity to *White*, was not aware that a Recovery had been suffered; therefore the Covenant was entered into under a mistake, and this Court will not grant any relief founded upon it. *Hitchcock v. Giddings* (l).

Mr. Girdlestone, jun. for the Trustees.

- (a) Sir W. Jones, 459. (b) 6 Mod. 258. (c) 3 T. R. 369.
(d) 1 Vez. 387. (e) Ibid. 409. (f) 1 Ans. 140
(g) 1 Atk. 489. (h) Dig. Tit. 3. (i) 1 Vern. 271.
(k) Sug. Vend. 6th Ed. 564. (l) 4 Price, 135.

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The VICE-CHANCELLOR:—

In this case the Plaintiffs appear to me to be entitled to relief at law upon the ground of estoppel. The Defendant *Tweddell* having averred in the Deed of Release, which, as it regards the Annuity, is also a Deed of Grant, that he was seised of a Remainder in Fee expectant upon the death of his Father, if the Plaintiffs were now to proceed by Entry or Distress, according to the terms of the Deed, and the Defendant *Tweddell* were in possession of the Premises, he would be estopped from stating that at the time of the grant he was not duly seised of the Estate in question according to the averments of the Grant. Estoppel runs with the Land, and binds not only the Party, but all who claim under him: and the Plaintiffs have therefore the same remedy against the possession of the Defendant *Burdon*, as they would have had against the possession of the Defendant *Tweddell*. The prayer of the Bill is, that it may be declared that the Estate and Interest which the Defendant *Tweddell* took in the Premises in question, under the Will of his Father, became, and are chargeable with the payment of the Annuity, subject to the term of 2,000 years. This is already declared by the law, upon the ground of estoppel.

The Bill then prays that it may be declared that the Conveyance of such Life Estate and Interest to the Defendant *Alexander Burdon*, is void as against the Plaintiffs; or that the same was and is subject to the payment of the said Annuity, or the Arrears thereof. This also is already declared by the law, upon the same ground. The Bill then prays that the Defendant, *A. Burdon*, may be decreed to join with all proper parties in executing a proper Deed for charging the Life Estate and Interest

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of the Defendant *Francis Tweddell*, in the said undivided Moiety of the said Hereditaments and Premises, with the payment of the said Annuity of 264 l., and with the like powers of Distress and Entry in case of nonpayment, as are contained in the said Indenture of the 28th February 1803; and for conveying the said undivided Moiety of the said Hereditaments and Premises to the Defendants *P. Tahourdin* and *Gilbert Tahourdin*, upon such Trusts as may be most proper for securing the payment of the said Annuity. But the Life Estate of the Defendant *F. Tweddell* is already, upon the ground of estoppel, effectually charged, as against the Defendant *Alexander Burdon*, and all who can claim under him, by the very Indenture of the 28th of February 1803. And, in like manner, and by the same Deed, the Life Estate of the Defendant *F. Tweddell* is already conveyed to the Defendants, the *Tahourdins*, upon the Trusts of that Indenture; and the Plaintiffs cannot be entitled to have it conveyed upon any other terms. The Bill then concludes with a prayer for the consequential Accounts of Rents and Arrears of the Annuity. In effect, therefore, the relief which is sought by this Bill, is the relief which the law affords. It is said, however, that the law does not afford relief in respect of the Trust Estate, conveyed by the Lease and Release of 1803 to the Defendants the *Tahourdins*, and that estoppel cannot be worked by Lease and Release, and therefore it was necessary to come into Equity: and this point was treated at the Bar as too clear for argument. My impressions were otherwise; and I requested that the Case might be a second time argued upon that point alone; and, after hearing that second argument, I am confirmed in my opinion that estoppel is as well worked by an Indenture of Release as by any other Indenture, and, consequently, that the Estate of the

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Tahourdin is the same as if the Defendant *Tweddell* had, at the date of the Release of 1803, been legally seised of the Remainder in question, and, as I have already stated, required no new Conveyance from the Defendant *Burdon*. The Conveyance by Lease and Release, like all other Conveyances that owe their effect to the Statute of Uses, will pass only such Estate as the party conveying may lawfully pass; because the consideration paid to the party conveying cannot raise a Use in any other Estate than his own. But estoppel applies only to Cases where the passing of an Estate does not come into question. The text-writers upon this subject state that estoppel is wrought by any Deed indented, making no exception as to the Indenture of Release: nor can I find a single authority where such a distinction is taken. Where by Deed indented a man represents himself as the Owner of an Estate, and affects to convey it for valuable consideration, having at the time no Possession or Interest in the Estate, and where nothing therefore can pass, whatever be the nature of the Conveyance, there, if by any means he afterwards acquire an Interest in the Estate, he is estopped in respect of the solemnity of the Instrument from saying, as against the other party to the Indenture, contrary to his averment in that Indenture, that he had not such Interest at the time of its execution. Is not an Indenture of Release as solemn an Instrument as any other Indenture? Of what importance to this principle can it be, whether the Indenture which operates this effect by its mere character as a solemn Instrument, is an Indenture of Release or an Indenture of Feoffment?

The Plaintiffs have, therefore, their remedy at law, and I am not aware of any circumstances in this Case which

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compel them to seek equitable relief, or of any principle which can entitle them in equity to a different relief from that which the law affords to them. It has been argued that, admitting the Estate in the *Tahourdins* to be effectual by way of estoppel, yet it was still necessary for the Plaintiff to come into equity, because the Right to sue at law is in them alone. It may be observed that the Trust in the *Tahourdins* is merely a Trust to sell, and, under all the circumstances, could hardly be exercised beneficially for the Plaintiffs. But suppose it were otherwise, no case is made in this Bill that it is necessary for the Plaintiffs to come into equity for relief against their own Trustees; and, on the contrary, the Bill seeks a new Conveyance to the same Trustees. This case is not, therefore, made by the Bill; but if it had, the Court would probably not have done more than to direct that the Plaintiffs should be at liberty to sue in the names of their own Trustees.

Let the Bill, therefore, be dismissed; but, considering the nature of the Defendant's Title, and that upon the grounds upon which the Court proceeds the Bill might have been demurred to, and the great Expense of the Suit avoided, let the Bill be dismissed without Costs.

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10th April.

Exceptions.

Exceptions cannot be taken to a *Master's* Report approving of new Trustees; nor will the Court interfere with the Report of the *Master* where there is no complaint that the persons approved of by him are unfit.

THE ATTORNEY GENERAL v. DYSON.

THIS was a Petition, by way of exception to the *Master's* Report, on the ground that the *Master* had approved of improper Persons to act as Trustees of a Charity. The Petition insisted that the *Master* ought to have approved of other Persons who had been proposed as Trustees.

Mr. *Hart*, and Mr. *Duckworth*, for the Petition.

Mr. *Agar*, and Mr. *Barber*, contra.

The VICE-CHANCELLOR:—

The Case of Trustees is within the same principle as that of Receivers. The Court will not enter into the consideration of comparative fitness; and there is no complaint here of unfitness on the part of the Trustees named by the *Master*.

Petition dismissed.

1826.
19th April and
24th May.

DRYDEN v. ROBINSON.

BY Indentures of Lease and Release, dated the 21st and 22d of September 1821, the Plaintiff conveyed certain real Estates to the Defendant *Abraham Dawson*, on trust to sell them, and out of the Proceeds to pay to the Defendant *Robinson* two Sums of 800*l.* and 400*l.*, and to pay to the Defendants *Roddam* and *Bell* a Sum of 300*l.*, and to pay the Surplus to the Plaintiff. By another Indenture, dated the 2d of May 1823, the Plaintiff charged the same Estates with the further Sums of 200*l.* 100*l.* and 510*l.* in favour of the Defendant *Robinson*, and also with such further Sums as *Robinson* might pay in consequence of his having become a Surety for the Plaintiff's Brother, in respect of a Sum of 390*l.*; and also with such Sums as *Robinson* and *Dawson* might pay for repairing the Premises or keeping them insured from Fire; and, after satisfying these Charges, the Produce of the Sale of the Estate was to be applied in payment of the joint Debts of the Plaintiff's Brother and his Partner in Trade, and the Surplus only to the Plaintiff.

The Bill prayed that the Indenture of May 1823 might be declared to be fraudulent and void, and be delivered up to be cancelled; and that the Defendant *Dawson* might apply the Purchase-money of the Estate according to the Trusts of the Indenture of September 1821.

All Persons interested under both Deeds were made Defendants.

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Plea.
Award.

An award made under an Agreement, entered into after a Bill is filed, to refer the whole Subject-matter of the Suit to an Arbitrator, may be pleaded to the Bill.

But where all the Parties to the Suit were not Parties to the Award (altho' the Plaintiff was a Party to it) and where part of the Prayer of the Bill was for the Execution of the Trusts of a Deed under which some of the Parties to the Suit were interested who were not Parties to the Award, a Plea of the Award was ordered to stand for an Answer, with Liberty to except.

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To this Bill the Defendant *Robinson* pleaded, in bar, that, by a certain Indenture, bearing date the 24th of February 1824, (being after the filing of the Bill) made between the Defendant *Robinson* of the 1st part, the Plaintiff of the 2d part, and *John Lindsay Angus* of the 3d part, it was agreed that the Subject-matter of the Suit in Chancery, and the Disputes and Differences between the Parties respecting the same, should be referred, to two Arbitrators, therein named: that the Arbitrators duly made their Award in writing, on the 12th of July 1824, and thereby confirmed the Indenture of May 1823, and all the Charges and Trusts therein contained, except those for securing the Payment of 510*l.* to the Defendant *Robinson*, and awarded that *Robinson* had no Claim upon the Plaintiff in respect of that Sum, or any Part of it; and they further awarded that nothing therein contained should be construed to prejudice or affect the Right of any Trustee under the Indenture of the 2d of May 1823 to retain, out of the Proceeds of any Sale thereby referred to, any Expenses which he or they were or was, or otherwise might be entitled to retain in carrying such Sale into effect; that the said *John Lindsay Angus* was entitled to the Principal Sum of 200*l.* from the Plaintiff, with Interest thereon at the rate of 5*l.* per Cent per Annum, to be computed from the 2d day of May 1823 until the same should be paid; that the said Principal Sum and Interest should be a Charge upon the Messuage and other Hereditaments comprised in the Indenture of the 2d of May 1823, and be paid out of the Proceeds of the Sale authorized to be made by an Indenture of Release therein mentioned of the same Messuage and other Hereditaments; that the Plaintiff and the Defendant *Robinson* respectively, and their respective proper Representatives

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should, at their own respective Costs and Charges, make, do and execute all such Deeds, Matters and Things as should be necessary and expedient, or as the Counsel of *John Lindsay Angus*, his Executors, Administrators or Assigns should require, to make such last-mentioned Charge available; that the Plaintiff should forthwith cause the Bill, exhibited by him against *Robinson* and others, to be dismissed; and that the Defendant *Robinson*, or others the Defendants to that Bill, should consent, at his or their own Expense, that the Bill might be dismissed, without any Costs to be paid to them or any of them; and that the Costs of the Reference and of the Award, amounting to 97*l.* 17*s.* 8*d.*, should be paid by *Robinson* and the Plaintiff in equal Shares.

Mr. *Heald*, and Mr. *Skirrow*, for the Plea:—

The Matter pleaded is a complete Bar to the Suit. The Plaintiff may enforce the Award, at Law, by an Action on the Bond, or, by an Attachment in the Court in which the Award has been made a Rule.

Mr. *Sugden*, and Mr. *Garratt*, for the Bill:—

It has been decided that a Plea is not the proper mode of using such Matter as a Defence. *Rowe v. Wood* (a), was a Case quite similar to the present. It was there held that an Agreement made between the Parties, after the Bill was filed, could not be pleaded in bar of the Suit. The Defendant ought to apply, by Motion, to stay Proceedings in the Suit.

There are other objections to the Plea:

(a) 1 Jac. & Walk. 315. See *Turner v. Robinson*, ante, 1 vol. 3.

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1st. It does not sufficiently aver the Identity of the various Instruments :

2d. The Award is bad on the face of it ; for the Reference was only between three Persons ; whereas this Bill is filed against other Persons, who have Sums charged upon the Estate in question ; and it prays that the Deed of 1823 may be set aside as to all the Parties, except as to Sums actually advanced upon it :

3d. This is a Plea in bar to the Bill. But it is settled that a Plea of any Matter subsequent to the filing of the Bill, should be a Plea to the further prosecution of the Suit. The Difference is that, by a Plea in bar, the Bill is dismissed with Costs, whereas the Award is that it should be dismissed without Costs.

Mr. *Skirrow*, in Reply :—

There is no Authority for the position that Proceedings in the Suit could be stayed by a Motion in such a Case as this. On the contrary, *Hutchinson v. Hodgson* (b), is an express Authority that there must be a Plea, and that a Motion is not the proper Course.

The VICE-CHANCELLOR :—

The Decision of the Arbitrators, that the Defendant *Robinson* is entitled to the Benefit of the Indenture of May 1823, except as to the Sum of 510*l.*, cannot conclude this Suit, which is, in effect, for the Administration of the Trusts of the Deed of 1821, and also of the Deed of 1823. And other Parties besides *Robinson*, who are no Parties to the Award, have an Interest in

(b) 2 An361.

the Trusts of the Deed. Yet, if this Plea were allowed, the Defendant *Robinson* would no longer be a Party to the Suit; and, without him, the Court would not have power to administer the Trusts of either Deed. For this reason I cannot allow this Plea; but will let it stand for an Answer, with liberty for the Plaintiff to except to it. It may, however, be found, at the hearing of the Cause, that the Award of the Arbitrators will be considered as the Measure of the Rights of the Defendant *Robinson*, and that the Plaintiff will prosecute the Suit at the hazard of paying those Costs from which he would be protected by the Award, if he had acted under it.

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FAIN v. AYERS.

THE Bill stated Indentures of Lease and Release, dated the 3d and 4th of November 1818, by which, in consideration of 170*l.* the Defendant conveyed to the Plaintiff a piece of Freehold Land, and covenanted, with the Plaintiff, for further assurance, in the usual manner; namely, that he the Defendant, and his Heirs, and all Persons lawfully claiming or to claim by, from, under or in trust for him or them, should and would, from time to time, and at all times thereafter, upon every reasonable Request, and at the Costs and Charges of the Plaintiff, his Heirs, Executors or Administrators, make, do and execute, or cause and procure to be made, done and executed, all such further and other Acts, Deeds and Assurances in the Law, for more satisfactorily assuring and confirming the said Premises thereby released and conveyed unto and to the use of the Plaintiff,

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1st June.

*Title Deeds.
Vendor and
Purchaser.*

If a Vendor retains the Title Deeds, and covenants for further Assurance only, the Purchaser may, under that Covenant, compel him to enter into a Covenant for production of the Deeds.

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his Heirs and Assigns for ever, as by the Plaintiff, his Heirs or Assigns, or his or their Counsel in the Law should reasonably be devised or advised and required.

The Bill then stated that this piece of Land had formed part of a larger Estate belonging to the Defendant; that no Title Deeds relating to it were ever delivered to the Plaintiff, nor was any express Covenant entered into for the production of them: that the Plaintiff had since sold the piece of Land, and was advised that he could not make a good or marketable Title to it without first procuring a Covenant from the Defendant for the production of the Title Deeds; but that the Defendant had refused to produce them, or to enter into a Covenant for that purpose.

The Bill prayed that the Defendant might be compelled to produce, or to execute a Covenant to produce the Title Deeds in question, in order that the Plaintiff might be enabled to make a good and marketable Title to the Land, the Plaintiff being willing to pay all reasonable Costs and Charges for the same.

The Defendant put in a general Demurrer.

Mr. *K. Parker*, for the Demurrer, insisted that the Plaintiff had made no Case for Equitable Relief, and had not even stated that the Defendant had the Title Deeds in his possession.

Mr. *Stephenson*, for the Bill, insisted that, under the Covenant for further Assurance, the Plaintiff had a Right to call upon him to execute a Covenant to produce Title Deeds, as being a further Assurance.

The *Vice-Chancellor* seemed inclined to think that the Case made by the Bill was not sufficient; but ordered the demurrer to stand for Judgment.

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The VICE-CHANCELLOR:—

I do not think that there has been a judicial Decision upon the particular Point, whether, under a Covenant for further Assurance in a Conveyance, a new Deed of Covenant to produce Title Deeds may be required. But, whatever doubt there may be upon that point, this Bill, stating that the Plaintiff has re-sold the Property, prays, alternatively, either a new Deed of Covenant to produce, or the actual production of the Title Deeds, to enable the Plaintiff to show a marketable Title upon his Re-sale. The Defendant's Title Deeds, being the Root of the Plaintiff's Title, and, in that sense, a sort of common Property (a), I strongly incline to think that the Plaintiff has an Equity to that extent; and I am informed that the *Lord Chancellor* has expressed an Opinion to that effect.

Demurrer overruled.

(a) *Barclay v. Raine, ante, vol. 1, 449.*

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26th April.

DARTHEZ v. WINTER.

*Debtor and
Creditor.
Executor. Trust.*

A Debtor to a Testator cannot maintain a Bill against the personal Representative, to obtain the directions of the Court as to the disposal of the Money due by him, and to restrain an Action, brought by the Personal Representative, to recover the Debt, on the ground that the Debt had been appropriated by the Testator for a particular purpose, and that the Personal Representative intended to apply it for purposes not warranted by the Will.

IN January 1819, *Francis de Rioboo*, late of *Lima*, deceased, remitted 20,000 Dollars to the Plaintiffs, who were Merchants residing in *London*, and, at the same time, wrote a Letter, in which, after advising them of his having remitted the 20,000 Dollars, he desired them, on the arrival of the Dollars, to effect their Sale at 5*s.* or upwards, without waiting for any rise in the Price; and, as soon as sold, to invest the Proceeds, at Interest, on good Security.

The Dollars were duly received by the Plaintiffs, and were afterwards sold by them for 4,007*l.* 14*s.* 2*d.*

Rioboo died shortly after the Dollars were remitted to the Plaintiffs, having made his Will, dated the 15th of June 1819. But the particulars of his Will were not known by the Plaintiffs until long after the two Letters after mentioned had been received by them. The only part of the Will which related to the Dollars was as follows: " I also declare that I have remitted to *Europe* a sum of 40,000 hard Dollars, in Specie, for the purpose of being laid out at Interest, in convenient Securities; which transaction is a thing well known to my Testamentary Executors, and which I require to be considered part of my Property and Effects: and it is my desire that the said sum of 40,000 Dollars do remain placed at Interest as I have determined, until my Children shall have attained the age of majority, forbidding, as I do hereby expressly forbid, that the said 40,000 Dollars be

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in other manner disposed of so long as my said Children shall not have so attained the age of majority; and that the Interest annually produced by the said Sum be added to the Capital to bear Interest, so that the whole, being united, may form one Capital only for producing Interest: and I order and direct that my Executors do annually demand, of and from the appointed Attornies, an account of the Transaction, for the purpose of observing and fulfilling all the Clauses contained in this my Testament. I, in the first place, name and appoint as my Executors my Wife *Dona Ysabel Dominguez* jointly with *Don Juan Francisco Clarick*, whom, as hereinabove mentioned, I appoint, by himself only, as Depository and Administrator of all the Property and Effects which I shall leave behind me at my death; and, on default of him, to each of the other Executors in their respective succession; provided that it be perfectly legal, and that it do not clash with my Dispositions contained in this Testament; in the second place, *Don Francisco Menendez*; in the third place, *Don Julian Parga*; and, in the fourth place, *Don Francisco Marino*, with this express declaration, that each of the said named Executors shall, in his regular turn, order and place, do and execute the functions committed to his charge, each of them however jointly, in his respective succession and place, with my said Wife; and that the latter, jointly with them in the first place named Executors, be considered as having the entire and absolute Management of the Executorship; and that it be understood that the joint Community of Management do pass, on default of *Don Juan Francisco Clarick*, to *Don Francisco Menendez*; on default of this latter, to *Don Julian Parga*; and, in default of them all, upon *Don Francisco Marino*: but, in the event of the death of my said Wife, it is my will and desire that each

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of the Persons named as my Executors in community with her, do then succeed and come in by himself for the Executorship; but that, in such a case the Trusteeship and Guardianship of my minor Children do devolve to *Don Francisco Marino*, named in the fourth place as my Executor, conferring upon them, all and each of them, in their regular order, succession and place, full power and authority, whenever her death takes place, to assume and enter into possession of my Property, and to dispose thereof in the most expedient manner in conformity with my will and desire, as expressed respecting the same, to pay, fulfil and observe all the several items and dispositions which I commit to their charge; and that the duration of their said functions be for one legal year, and for any longer time, as may be necessary, for which purpose I do prolong the said Term."

By the 40,000 Dollars mentioned in the Will, were meant the Dollars remitted to the Plaintiffs, and some others which had been remitted, in like manner, to some other Merchants in *London*.

In December 1819, *F. A. Zavala*, who had recommended *Rioboo* to remit the Dollars to the Plaintiffs, wrote to them the following Letter:—" *Lima*, 20th December 1819. Dear Sirs,—Mr. *F. Rioboo*, deceased, particularly requested of me that I should take care of the destination of net Proceeds of 20,000 Dollars which he remitted to you; and, it being his wish that they may be left in your hands, producing an Interest, until the Minors be in age to dispose of them to their advantage, in future you will be pleased to follow on the same the directions of his Executors, his Widow and *Don J. F. Clarick*. I am, dear Sirs, *F. A. Zavala*."

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And *J. F. Clarick*, about the same time, wrote and sent to the Plaintiffs the following Letter:—"Dear Sirs, —*Mr. F. Rioboo*, having died, left to my care, as first Executor conjointly with his Widow, *Dona Ysabel Dominguez*, all his Property; in consequence of which, and of his having recommended particularly to *Don F. A. Zavala* the management and directions of the net Proceeds of the 20,000 Dollars which he remitted to you on board His Majesty's Ship *Blossom*, and, it being his wish that they might remain in your hands at Interest till the Minors, to whom they belong, be enabled to dispose of them, meanwhile you will be pleased to communicate on this matter with me. I take note of their Proceeds reduced, and that they are invested at an Interest according to the order of the said deceased *F. Rioboo*; and I hope that you will continue giving me your advices as to their production. It is convenient that you should not say how or by which way you became possessed of the said Sums, as it is to be inserted in the Inventory. The inclosed Letter is from our *Don F. A. Zavala*, who confirms what I have said before. I am, dear Sirs, *J. F. Clarick*."

No further application was made to the Plaintiffs respecting the Dollars, or their Proceeds, till the time after mentioned.

About the 6th of July 1825, limited Letters of Administration of the Goods and Chattels of *P. de Rioboo* were granted, by the Prerogative Court of the Archbishop of *Canterbury*, to the Defendant *Samuel Winter*. Under these Letters of Administration, *Winter* commenced an Action against the Plaintiffs, in the Court of King's Bench, for the recovery of the Proceeds of the

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Dollars and Interest. In order to show his Title to receive the Proceeds of the Dollars, and the purposes to which they were intended to be applied, he produced to the Plaintiffs *Copies* of certain Proceedings in a Court of Justice in *Lima*, consisting (amongst others) of a Memorial or Petition presented to that Court by *J. F. Clarick*, in which, after stating a Balance of 43,756 Dollars, 5 Reals, and 6/8ths, to be due to him from the Testator's Estate, upon his account as Executor of the Testator's Will, for Monies expended by him in the Maintenance, Education and Clothing of the Widow and Children, he prayed the Court to appropriate and allow him, in payment of the Balance in his favour, the 40,000 Dollars then in the hands of the Mercantile Houses in *London*, setting aside the prohibition made by the Testator in his Will as above stated. And he also produced a Copy of the Decree of the Court, made upon the Petition, as follows: "*Lima*, the 10th September 1824. Having seen the preceding Acts, containing the Exposition made by the Widow of the late *Don Francisco Rioboo* as Executrix, Guardian and Trustee of her minor Children, and those of the Counsel and General Defender of Minors, and taking into consideration that the political events of the time, and the present state of War, which have accrued since the Epoch when the Testator made his Will and Testament, and have paralyzed, and even nearly ruined, the considerable Funds and Property appertaining to the Estate and Executorship, that the same have hardly produced sufficiency for the Support of the Widow and her minor Children, to which the Co-Executor himself has in some measure contributed, and thereby, in some measure, has been occasioned the Balance presented by the Account exhibited by him and approved of on the part

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of the Parties concerned; the Court does pronounce and decide that, out of and from the Capital existing in *London*, there be paid to the said Executor, in part payment of his Balance, the sum of 12,000 Dollars, thus far setting aside the Prohibition made in that respect by the deceased Testator, in Clause 24 of his Will and Testament."

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The Bill, after stating as above, alleged that, it appearing, from the Proceedings in the Court at *Lima*, that the Balance claimed to be due to the Executor consisted, in part, of Disbursements to which the 40,000 Dollars mentioned in the Will were not thereby made liable, and which were also in some respects improper; and that there was an intention to apply the Proceeds of the Dollars, or some part thereof, to purposes in derogation of, or inconsistent with the Will, the Proceeds of the Dollars, if paid to the Defendant, would be applied contrary to the directions of the Will in regard to the 40,000 Dollars, and that, in fact, the Defendant and the Executor intended so to apply those Proceeds, when received; and that, under these circumstances, the Plaintiffs were doubtful whether they had not been constituted Trustees of the Proceeds for the benefit of the Children of the Testator, and whether the Court at *Lima* had competent Jurisdiction to make the Decree, and thereby to set aside the Testator's Will to the extent aforesaid; and whether the state of the Testator's Assets required the application of the Proceeds of the Dollars, or any part thereof, to payment of the demand of his Executor; and whether, from the tenor of the Letter of the Executor, *J. F. Clarick*, to the Plaintiffs, he had not some intention to appropriate the whole of the Proceeds to his own use, or otherwise to misapply the same; and

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whether the Defendant, under the limited Letters of Administration and the Powers aforesaid, was fully authorized to receive those Proceeds; and, therefore, the Plaintiffs were advised that they could not safely pay the Proceeds, or otherwise dispose thereof, without the Direction and Indemnity of the Court. The Bill further stated that the Executors of *F. de Rioboo*, and all his Children, were resident in *South America*. It prayed that it might be declared, by the Court, in what manner the Proceeds of the 20,000 Dollars, and the Interest thereof, ought to be applied, the Plaintiffs being willing to pay and dispose of the same accordingly; and that *Winter* might be restrained from further proceeding in his Action at Law.

The Defendant *Winter* demurred, generally, to the Bill.

Mr. *Hart*, and Mr. *Hull*, in support of the Demurrer:—

This is a Bill of Interpleader with one Defendant only. There is no Case in which it has been held that a Debtor can come into this Court, admitting that he is a Debtor, and alleging, as a reason for seeking the protection of the Court, that some Person has persuaded him that, if he pays the Debt to his Creditor's Personal Representative, he will hereafter be damnified. There is no Case in which this Court prevents the Personal Representative from recovering a Debt, because there is an outstanding Equity.

Mr. *Sugden*, and Mr. *Sidebottom*, in support of the Bill:—

A Testator may appropriate part of his Personal Estate for the benefit of certain Parties. This Fund was

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appropriated by the Testator in his lifetime, and by the Executors after his death. The Defendants do not claim in the character of Executors the whole Fund, but only 20,000 Dollars of it; and, the purpose for which it is intended to apply them is in direct violation of the Will.

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The VICE-CHANCELLOR:—

It is not disputed that the Property in the hands of the Plaintiffs is vested in the Defendant, as representing the Executrix and Executor in *Lima*: but it is suggested that the Executrix and Executor have a purpose to apply it in a manner not warranted by the Will of the Testator. In this alleged misapplication the Plaintiffs have no Interest: and this Court cannot, at their request, take upon itself the administration of the Testator's Estate.—Let the Demurrer be allowed.

25th April.
30th May.
1st & 27th June.

DUFFIELD v. ELWES.

*Devise.
Revocation.*

Testator devised his Estates at S. and H. to Trustees, in Trust, if there should be only one Son of D. who should attain twenty-one, for that Son, and in case there should be two or more such Sons, in Trust for the second of them, and gave all the Residue of his Estates to Trustees, in Trust to sell. He afterwards drew his Pen through the Trust to sell, and, by a Codicil, declared that he intended to erase the direction to sell only: he then gave all his Estates to the Son of D. who should first attain twenty-one, and change his name to E.—D. at the death of the Testator had a Son who was still an Infant, and afterwards had another Son. Held, that the Codicil revoked the Devise of the S. and H. Estates, and also the Devise of the Residue of the Estates to the Trustees; and that D.'s eldest Son took under this Codicil an immediate vested Interest, both in the Estates of which the Testator was seised at the date of his Will and those he purchased afterwards, and consequently was entitled to the Rents during his Infancy.

AT the hearing of this Cause the *Vice-Chancellor* directed a Case to be stated, for the Opinion of the Judges of the Court of King's Bench (a), upon Six Questions as to the construction and effect of the Will and Codicil of the late *George Elwes*, Esquire, the Father of the Plaintiff, Mrs. *Duffield*.

That Case was argued at the Sittings after Easter Term, 1825; and the Judges afterwards certified their Opinions to this Court. When the Case was argued, Mr. and Mrs. *Duffield* had only one Son, but they had afterwards a second Son born; and a Supplemental Bill was filed against him. The Cause now came on to be heard for further Directions.

Mr. *Sugden*, and Mr. *Longley*, for the Plaintiffs,
Mr. and Mrs. *Duffield*:—

The Certificate, as to the fifth and sixth Questions, cannot be maintained. It is quite clear, when the nature of the Trusts is considered, that the Testator could not mean to give either the *Southwood* and *Haverhill*, or the

(a) For the Report of this Case, see 3 Barn. & Cress. 705.

Withersfield Estates, to the Trustees during the period from his own death until a Son of Mr. and Mrs. *Duffield* should attain the age of Twenty-one years.

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The Testator could not mean those Estates to be sold for that period. The amount of the surplus Rents would vary according to the demands upon them for Maintenance; and, therefore, nobody could purchase them. It is quite clear that the Devisee cannot claim these surplus Rents, as he is to take nothing until he attains Twenty-one. The consequence is, that Mrs. *Duffield* is entitled to them, as part of the Testator's Real Estate which is undisposed of.

Next, the intermediate Rents of the *Withersfield* Estate are not affected, either by the Will or Codicil, singly, or by both of them, jointly. Not by the Will, singly; for the Testator was not seised of that Estate at the date of his Will: not by the Codicil, singly; for the Devise in it is clearly an Executory one. *Stephens v. Stephens* (b), *Hopkins v. Hopkins* (c), *Bullock v. Stones* (d), in which Case Lord *Hardwicke*, C. considered it quite clear that the intermediate Rents would have gone to the Heir, if the Testator had not directed the Devisee to be brought up. *Grant's Case* (e), *Bate v. Amherst* (f), *Snow v. Tucker* (g), *Fearne's Essay*, 400, and *Posth. Works*, 191. If then the Devise in the Codicil be Executory, the Devisee cannot be entitled to the intermediate Rents, as he is to take no Interest in the Estates, the subject of the Devise, before he attains Twenty-one, and changes his name to *Elwes*.

(b) Ca. Temp. Talb. 228. (c) Ibid. 44. (d) 2 Vez. 521.
(e) 2 Leon. 36, and 10 Co. 50, a. (f) Sir T. Raymond, 83.
(g) 1 Sid. 153.

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The Cases in which the Devisee takes a vested Interest in the Rents and Profits, are either where he is a certain, known and assignable Person, and must have the Estate if he attain Twenty-one; or where the Estate is given over in case of his death under Twenty-one. There is no Case in the Books, where there is not a devise over, that the intermediate Rents go to the Executory Devisee. The Decision in *Boraston's Case* (h) turned upon the adverbs of time, and the Devisee was expressly pointed out by name. One or both of the circumstances above mentioned occurred in *Bromfield v. Crowder* (i), *Edwards v. Hammond* (j), *Goodtitle v. Whitby* (k), *Doe v. Lea* (l), *Doe v. Moore* (m), *Doe v. Nowell* (n), and *Warter v. Hutchinson* (o), in which last Case there was a present Devise of a chattel Interest to Trustees until *John Warter* came of age. In the present Case a double qualification is required; not only that the Devisee should attain Twenty-one, but that he should also take the name of *Elwes*; and there is no Devise over.

Lastly, the intermediate Rents cannot be affected by the Will and Codicil jointly: for, if a Testator assumes to dispose of an Estate by a Codicil, no Devise in his Will can be called in aid of that Disposition. But the Codicil does not confirm the Will, generally, but only "except as is before excepted." And, although a Codicil is in general a republication of the Will, its operation will be limited if such appear to have been the Testator's intention. *Countess of Strathmore v. Bowes* (p), *Drink-*

(h) 3 Co. 19, 2. (i) 1 N. R. 313.

(j) 2 Show. 398; S. C. 3 Lev. 132, and 1 N. R. 324, in Note.

(k) 1 Burr. 228. (l) 3 T. R. 41. (m) 14 East, 601.

(n) 1 M. & S. 327; and see *Randoll v. Doe*, 5 Dow. 203.

(o) 1 B. & C. 721. (p) 7 T. R. 482, and 2 Bos. & Pul. 500.

Water v. Falconer (q), *Crosbie v. Mac Doual* (r), *Holder v. Howell* (s).

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Mr. Hart, and Mr. Pemberton, for the Defendant,
George Thomas Warren Hastings Duffield, the
eldest Son:—

The eldest Son is as much interested as the Heir at Law is in contending that the Certificate is wrong, so far as it gives the surplus and intermediate Rents to the Trustees. Then the question is, whether those Rents are a resulting Trust for the Heir, or go to the Person to whom the Estate is devised. The Courts strongly incline to hold that those Rents go to the Devisee. All the Authorities upon the subject were before the Court in the Case of *Warter v. Hutchinson*, and are referred to in the Arguments, in the Court of King's Bench, of the Case stated in this Cause for the opinion of that Court.

Mr. Horne, and Mr. Newland, appeared for the Testator's Widow, who had no Interest in the Rents in question.

Mr. West, for the Daughters of Mr. and Mrs. Duffield:—

The Devise in the Codicil is Executory. There is no Case where a Gift, made upon a double contingency, has been held to create a vested Estate. There is a difference between a Devise to take effect upon an event which must take effect if the Devisee lives, and one which may not take effect at all, such as Marriage. *Atkins v. Hiccocks* (t). As the Testator directed the

(q) 2 Ves. 626.

(s) 8 Ves. 97.

(r) 4 Ves. 610.

(t) 1 Atk. 500.

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Rents of the Estates devised to his Son to be applied by the Trustees for his Maintenance, it is evident that he did not intend those Rents to go to the Son. The Codicil was a republication of the Will, so as to make the intermediate Rents of the *Withersfield* Estate pass by it. *Doe v. Meredith* (v), *Pigott v. Waller* (w), *Hulme v. Heygate* (x).

Mr. Pemberton, in Reply:—

The Court of King's Bench has held that, under the Devise in the Codicil, both the Estates which the Testator was seised of at the date of his Will, and those which he purchased afterwards, passed to the eldest Son; but that, as to both classes of Estates, the intermediate Rents went to the Trustees. It is impossible to maintain this Opinion. It may be questioned whether the Codicil was not a revocation of the Devise to the Trustees of the Estates which the Testator was seised of at the date of his Will; for by the Codicil he makes an express Devise of all his Estates, which is inconsistent with the Devise in his Will. The Erasure was, in point of fact, more extensive than the Testator intended it to be, as it covered a direction to get in the outstanding Personal Estate. This accounts for the necessity of making the introductory Declaration in the Codicil, as to the Erasure. The Testator intended the Erasure to extend to his Real Estates only, and not to his Personal Estate; and the reason why he did not strike out the Devise to the Trustees altogether was, that he could not do so without striking out that part which related to the Personal Estate. The purposes for which the Real Estates were devised to the Trustees were to sell and pay

(v) 2 M. & S. 5. (w) 7 Ves. 98. (x) 1 Mer. 285.

debts, &c. By the Codicil, he says that he does not mean his Real Estates to be sold, but to go to the eldest Son of Mrs. *Duffield*. It would be singular, then, to hold that the Testator meant the Devise to the Trustees to remain, when the purposes for which that Devise was made were revoked by the Codicil. At all events, if that Devise was not revoked, the Trustees hold the Estates for the Persons to whom they are given by the Codicil.

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ELWER.

It was said, by the Counsel for the Plaintiffs, that all the Decisions in which the Devisee was held to take an immediate vested interest depended upon the adverbs of time, "when, then, until," &c. being used. But this is contrary to the fact. Those adverbs did not occur in the Cases of *Edwards v. Hammond* (which was the first Case that was decided after *Boraston's Case*), *Bromfield v. Crowder*, *Spring v. Caesar* (y), or *Doe v. Nowell*. In this last Case there was nothing given to any Person then in *esse*, but only to a Person who should answer a particular description at a particular period. *Snow v. Tucker* does not support the position for which it was cited. *Grant's Case* (z) does not apply. There *Grant* devised to his Wife for Life, and when *J. G.* came to his age of Twenty-five years, then that he should have the Land in Fee. *J. G.* levied a Fine of the Land to *A. B.* before he attained Twenty-five; and afterwards attained Twenty-five, and then died; and it was held that his Heir was barred by the Fine. Now it is obvious that this Decision proceeded not on the ground that *Grant* did not take, but that he did take a vested Interest in the Land.

(y) 1 Roll's Ab. 415.

(z) Reported Cro. Eliz. 122, by the name of *Johnson v. Gabriel and Bellamy*.

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Mr. *Fearne's* opinion that has been referred to, is directly contradicted by the subsequent Authorities. It rests upon the ground that the Devise is immediate, and not in remainder, and that there is no intermediate disposition of the Rents until the period arrives when the Estate is to vest in possession. This is contrary to *Bromfield v. Crowder*, *Doe v. Nowell*, and *Doe v. Moore*, where Lord *Ellenborough*, C. J. expressly says that those circumstances make no difference.

Then with respect to the Argument founded on there being a Devise over. It is said that such a Devise has been found in every Case where the Devisee was held to take an immediate vested Interest. If a Testator intends an Estate to go over if a particular event does not happen, he must express to whom it is to go, unless he intends the Heir to take it. But unless the Devise over is to the Heir, so as to show, by implication, that the Heir is not to take sooner, what possible difference can it make? But in fact the Authorities do not warrant the assertion. In the very first Case that introduced the law, *Boraston's Case*, there was no Devise over. Nor was there any such Devise in *Edwards v. Hammond*, *Spring v. Casar*, *Goodtitle v. Whitby*, *Manfield v. Dugard* (a), or in *Doe v. Lea* (b). Many other Cases are collected by Mr. *Fearne* (c), and it is remarkable that he never once refers to the circumstance of a Devise over as material either way; nor is it relied on in any of the Judgments in the Cases referred to, although it is in some of the Arguments. But suppose that circumstance were of any weight, it might be fairly said

(a) 1 Eq. Ab. 195.

(b) 3 T. R. 41.

(c) See Cont. Rem. 241, *et seq.*

to occur in this Case; for what real distinction is there between a Devise to the first Son who attains Twenty-one and takes the name of *Elwes*, and one to the eldest Son, and if he did not attain that Age and take the Name, then to the second Son?

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It is next said that there is a distinction between a Devise which is to take effect upon an event which must happen if the Devisee lives, as his attaining the age of Twenty-one, and one upon an event which may not happen, as his taking a particular Name; and for this *Atkins v. Hiccocks* was cited, which was a Bequest to a Daughter when she should marry. Now an event must be either certain or contingent. *Driver v. Frank*(d). It cannot be more or less contingent, though it may be more or less probable. The rule is to collect the intention of the Testator by looking at the whole Will. Now is the direction, that the Devisee shall take the Testator's Name, sufficient to make the Court conclude that the Testator did not intend him to take an immediate Interest, when every other provision in the Will is in favour of such intention? His taking the Name if he does attain Twenty-one, is much more probable than his living to be Twenty-one at all. The Case referred to, and all the reasoning, proceed solely on principles applicable to Personal Estate. The construction of a Will, with respect to Real Estate, is directly opposed to the construction as to Personal Estate. *Doe v. Moore*; *Hanson v. Graham*(e). However, if *Atkins v. Hiccocks* had related to Real Estate, neither the Decision, nor the reasoning on which it was founded, would have applied;

(d) 3 M. & S. 25.

(e) 6 Ves. 239.

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for it proceeded on the maxim, "*Dies incertus conditionem facit.*" The Legacy was not given at a particular time, if the Legatee should marry; but when she should marry with the consent of her Brothers. Here there is no uncertainty as to the time. The changing the Name is as fixed in point of time as the attaining Twenty-one. As soon as the Grandson attains Twenty-one he is to take the Name. This was the main ground for holding the Estate vested in *Spring v. Caesar*. The payment or non-payment of the Money was contingent, but a time was fixed for the payment to be made. In *Atkins v. Hiccocks* nothing could be more uncertain than the event, or the time at which it was to take place. It did not depend upon the Legatee. It was uncertain when she would marry, whether she ever would have an opportunity of marrying, or whether she could obtain the consent of her Brothers if she did marry. The taking the Testator's Name is in fact no contingency. It is merely an obligation which he imposes on the person who is the object of his bounty.

The *Vice-Chancellor*, at the conclusion of the Reply, observed that the second Son had a material Interest in the surplus Rents of the *Southwood Park* Estate, and desired that some Counsel might be instructed to appear for him.

1st June.

Accordingly, on this day, Mr. *Rose* appeared for the second Son, and covenanted that the second Son was entitled to the surplus Rents; for as soon as he was born he took a vested Interest. *Bromfield v. Crowder* (f), *Doe v. Moore*, *Doe v. Nowell*, and the observations of *Dampier, J.* in *Driver v. Frank*.

(f) 1 New Rep. 313.

The VICE-CHANCELLOR :—

The Judges of the King's Bench have certified their Opinion that the surplus Rents and Profits of the Freehold and Copyhold Estates at *Southwood*, and of the Freehold Farm at *Haverhill*, devised by the Will, after providing for the Maintenance of the Devisee thereof, belong, at Law, to the surviving Trustee; and this Opinion cannot be questioned, since the Trustees, in order to provide for such Maintenance, must necessarily be in the receipt of the Rents and Profits. The question who is equitably entitled to such surplus Rents and Profits remains for the consideration of this Court.

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The Devise in question is, in case there shall be but one Son of Mr. and Mrs. *Duffield* who shall attain the age of Twenty-one years, upon Trust for such Son, his Heirs and Assigns for ever; and, in case there shall be two or more Sons of Mr. and Mrs. *Duffield* who shall attain the age of Twenty-one years, then in Trust for the second of such Sons, his Heirs and Assigns for ever. At the death of the Testator, Mr. and Mrs. *Duffield* had only one Son, and four Daughters; the question is, whether the only Son then took a present vested Interest, subject to be divested by his death before Twenty-one, or by the birth of another Son, or whether the Estate was to remain in contingency till there was no possibility of another Son, or until a second Son attained Twenty-one. In *Bromfield v. Crowder*, and the well-known Cases of that class, the Estate, which was held to be vested, was to belong to another Person upon one event only, namely, the death of the Taker before he attained Twenty-one. But here there were two events, by either of which the Estate was to belong to another Person, namely, by the death of the only Son before he

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attained Twenty-one, or by the birth of another Son; and so far this Case appears to be new in circumstance. This doctrine of Estates vesting subject to be divested upon a subsequent event, is not confined to Cases where the subsequent event is that the Party attains Twenty-one. In *Spring v. Cesar*, in Roll's Abridgment, which was cited in the Argument, a Fine was levied to the use of A. and his Heirs, if B. did not pay him 20s. on the 10th of September, and if B. did pay it accordingly, then to the use of A. for life, remainder to B. and his heirs, and it was held that A. took a vested Fee, subject to be divested by B.'s subsequent payment. As the same doctrine is to be applied, therefore, where the subsequent event is other than the Taker's death before Twenty-one, it is difficult to find a principle why another event for divesting the Estate may not be superadded to the event of the Taker's death before Twenty-one. And I consider the present Case, as to these surplus Rents, to be, in effect, decided by *Bromfield v. Crowder*, and that class of Cases, and that here the only Son, at the death of the Testator, took a vested Interest, subject to be divested by his death before Twenty-one, or by the birth of another Son. Another Son has since been born, and the Estate of the only Son is now divested, subject however to be revested if no other Son should attain Twenty-one. The Judges of the King's Bench have certified that the Estates purchased after the Will pass by the Codicil to the first Son of Mrs. *Duffield* who shall attain Twenty-one and change his name to *Elwes*. They subsequently certify that the intermediate Rents and Profits of the Testator's Real Estates, which are devised by the Codicil to the first Son of Mrs. *Duffield* who shall attain Twenty-one and change his name to *Elwes*, until such events take place, shall belong to

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A. *Chambers*, the surviving Trustee under the Will. There appears some inaccuracy of expression here. If it be meant that the after-purchased Estates pass by the Codicil, inasmuch as the Codicil operates as a republication of the Will, then it would seem more accurate to say that those Estates pass by the Will. If they do not pass in consequence of the republication of the Will, but by the force of the Codicil alone, then such Rents and Profits cannot belong to the surviving Trustee under the Will. By the Will, the residuary Freehold Estates of the Testator are given, with all his other residuary Property, to Trustees, to be sold, and the produce of the Sale is directed to be applied in the manner therein stated. By the pen-lines drawn through this part of the Will, and by the Codicil, the Power of Sale of the Freehold, which is given by the Will to the Trustees, is expressly revoked; and, by the Codicil, the Testator makes a new Disposition of all his Freehold Property, Lands, Tenements and Hereditaments, to the first Son of his Daughter who shall attain Twenty-one and change his name to *Elwes*. And this new Disposition, being totally inconsistent with all the Trusts of the Will as to the Freehold, it appears to me that the better decision is, that the Codicil wholly revokes the Devise in the Will of the Freehold Estate to the Trustees, and that the first Son of Mrs. *Duffield* who shall attain Twenty-one, and change his name to *Elwes*, takes not an equitable Estate through the Trustees named in the Will, but a legal Estate, by force of the Codicil alone; and consequently the intermediate Rents and Profits of the Freehold Estates, if they pass by the Codicil only, cannot belong to the surviving Trustee under the Will. Whether, however, this Son takes a legal or an equitable Estate in the Freehold, the

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question, as to the beneficial Interest in the intermediate Rents and Profits, will be the same. Here the Testator directs that the Son of Mrs. *Duffield* who shall first attain Twenty-one, shall, on attaining such age, change his name to that of *Elwes*, and then the Devise is to the said Son of his Daughter, on his attaining his age of Twenty-one and changing his name to *Elwes*. If the Devise had been to the Son of Mrs. *Duffield* who shall first attain Twenty-one, without more, there could be no question that the only Son would take a vested Interest; subject to be divested by his death before Twenty-one; and I am of opinion that the additional words as to changing his Name made no difference. If words of condition, they are, necessarily, words of condition subsequent; but, there being no Devise over, they are rather to be considered as words of commendation.

Let it be declared, therefore, that not the surviving Trustee under the Will, according to the Opinion of the King's Bench, but the eldest Son of Mrs. *Duffield*, is now entitled to the Rents of the Estates devised by the Codicil to the Son of Mrs. *Duffield* who shall first attain the age of Twenty-one years and change his name to *Elwes*; with liberty to any Party interested to apply in case of his death before Twenty-one.

SMITH v. NELSON.

1826.
25th February,
& 5th May.

UPON a Sale under a Decree, the usual reference of Title was made to the *Master*. He reported against the Title. The Purchaser now moved for the Costs of the Reference, there being no Fund in Court.

*Vendor and
Purchaser.
Costs.*

Mr. *Tinney*, for the Purchaser, cited *Reynolds v. Blake (a)*.

—
A Purchaser under a Decree is entitled to his Costs where the *Master* reports against the Title, although there is no Fund in Court.

Mr. *Treslove*, *contra*, cited *Lechmere v. Brasier (b)*.

The Case stood over for inquiry into the Practice.

The *Vice-Chancellor* stated that it appeared that the Cases were not uniform ; and that it was not consistent with principle, that the right of the Purchaser to be indemnified for Expenses improperly occasioned to him by the Suit, should depend upon the circumstance whether there did or not happen to be Funds in Court at the time of the *Master's* Report ; and he ordered the Costs to be paid by the Plaintiff to the Purchaser, without prejudice to the question how such Costs should ultimately be satisfied.

(a) *Ante*, 117. (b) 2 Jac. & Walk. 287.

1826.
26th April,
& 3d May.

OXENFORTH v. CAWKWELL.

Devise.
Copyhold.

Devise of
"all my Free-
hold and Copy-
hold Mes-
suages, &c. the
Copyhold parts
thereof having
been duly sur-
rendered to the
uses of this my
Will," passes
unsurrendered,
as well as sur-
rendered Copy-
holds.

A TESTATOR who was seised of certain Copyhold Estates, part of which he had surrendered to the use of his Will, and other part of which he had not so surrendered, devised as follows: "And as to all and every of my Freehold, Copyhold and Leasehold Messuages, Lands, Tenements and Hereditaments, whatsoever and wheresoever situate, not hereinbefore given, devised or bequeathed, the Copyhold parts thereof having been duly surrendered to the uses of this my Will, I give, devise and bequeath the same unto my Nephews, W. C. and E. O. their Heirs, Executors, Administrators and Assigns, according to the nature and quality thereof, respectively, in equal Shares."

The question was, whether the unsurrendered Copyhold passed under this Devise to the two Nephews.

Mr. *Horne*, and Mr. *Pemberton*, for the Plaintiff, contended that it did not pass, and cited *Gascoigne v. Barker* (a); *Wilson v. Mount* (b); *Blunt v. Clithero* (c).

Mr. *Hart*, and Mr. *Wakefield*, for the Defendant, relied on *Banks v. Denshaw* (d); *Rumbold v. Rumbold* (e); *Strutt v. Finch* (f).

- (a) 3 Atk. 8. (b) 3 Ves. 191. (c) 10 Ves. 589.
(d) 3 Atk. 585, and 1 Ves. 63. (e) 3 Ves. 65.
(f) *Ante*, 229.

The VICE-CHANCELLOR :—

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OXENFORTH
v.
CAWKWELL.

The single question is, whether the expressions used by the Testator manifest an intention that all his Copyholds should pass, or that such of his Copyholds only should pass as he had surrendered to the use of his Will. The expression, "the Copyhold parts thereof having been duly surrendered to the uses of this my Will," considered in its natural sense, simply affirms that he had surrendered to the use of his Will all the Copyhold part of his Gift, namely, "all his Copyhold Lands, Tenements and Hereditaments, whatsoever and wheresoever situate, not thereinbefore devised;" and because he happened to be in one particular mistaken in the fact affirmed by him, I cannot therefore assume that he had an intention which is neither warranted by the particular expression relied upon, nor reconcilable to the other parts of the Will.

I agree that there is a great resemblance between this Case and the Case of *Wilson v. Mount*; but there is a difference in the language, and the expression here used is less susceptible of a restrictive sense. Lord *Alvanley* had great difficulty in coming to his conclusion in *Wilson v. Mount*, but considered himself as yielding to authority, and his decision has not given universal satisfaction. Applying to this Case, as I must do, the general principles of construction, I am bound to declare that it was the intention of this Testator that all his Copyhold Estates should pass.

1826.
31st May,
& 12th July.

WATKINS v. STONE.

Pleading.

One of the Defendants to a Bill by Tenants in Tail for redemption of an Estate, having put in a Plea of a Fine levied of part of the Estate averring that the part included in the Fine was the only part of the Estate in which the Defendant claimed any Interest, and accompanied by an Answer admitting the possession of Title Deeds, &c.: Held, that the Plea was overruled by the answer.

THE Bill stated that, in 1755, *Elizabeth* and *Letitia Hughes* were seised in Fee of certain Real Estates in the County of *Monmouth*, called *Gelly Vawr*, *Gelly Vach*, *The Pant*, and *The Packhorse*, subject to a Mortgage in Fee to one *Robert Lucas*, for securing 1,500*l.* and Interest: that, in January 1755, *William Watkins*, the Plaintiff's Grandfather, agreed to purchase this Property for 2,480*l.* 10*s.*; and thereupon, by Indentures of Lease and Release, dated the 27th and 28th of January 1755, and made between *E.* and *L. Hughes* of the one part, and *Watkins* of the other part, the Estates were conveyed to him in Fee Simple: that, by Indentures of Lease and Release, dated the 24th and 25th of April 1755, made between *Watkins* and *Philadelphia* his Wife, of the first part, *Ann Constable*, who was described as Sister-in-law of *Philadelphia Watkins*, of the second part, and *Thomas Symons*, of the third part, after reciting the Purchase and Conveyance to *Watkins*, and that 980*l.* 10*s.*, part of the Purchase-money, had been advanced by *Ann Constable*, upon condition that the Estates should be settled to the uses after mentioned, the Estates were conveyed by *Watkins* to *Symons* in Fee, to the intent that *Ann Constable* should, subject to the Mortgage for 1,500*l.*, receive a Rent-charge of 30*l.* per annum, for her Life, and, subject to the Mortgage and Rent-charge, to the use of *Watkins* and *Philadelphia* his Wife, for their Lives and the Life of the Survivor, with remainder to the use of the Heirs of the body of *Philadelphia* by *Watkins*, with remainder to the use

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WATKINS
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of the right Heirs of *Watkins*: that, by Indentures dated the 6th and 7th of May 1760, *Watkins*, in consideration of a Release of the Interest then due on the Mortgage, and for other considerations therein mentioned, released and conveyed to *Ann Constable* and her Heirs, all his Interest in the Property, subject to the Estate and Interest therein of *Philadelphia Watkins* and the Heirs of her body: that *Watkins* died, many years ago, in the lifetime of *Philadelphia* his Wife; and that *Edward Watkins*, her eldest Son by him, died in 1816, in her lifetime, without issue: that *John Watkins*, the plaintiffs' father, her second Son by *Wm. Watkins*, also died in her lifetime, leaving the Plaintiffs his only Children and Coheirs at Law: that *Philadelphia Watkins* died in January 1823, leaving the Plaintiffs the Heirs of her body by *Wm. Watkins*, and, as such, entitled to the Estates in question, subject only to what, if any thing, was due on the Mortgage: that, by Indentures of Lease and Release, dated the 23d and 24th of June 1758, to which *Wm. Watkins* and *Philadelphia* his Wife were named as Parties, and which were duly executed by *Wm. Watkins*, after reciting that *Ann Constable* had paid 1,600*l.*, being all that was due for Principal and Interest on the Mortgage, the whole of the mortgaged Premises were conveyed to her in Fee, subject to a Proviso for Redemption, on payment of the 1,600*l.* and Interest, by *Watkins* and *Philadelphia* his Wife, or either of them, or the Heirs of either of them; and it was thereby provided that upon payment thereof *A. Constable* should reconvey the Premises to the uses of the Indentures of April 1755; and they thereby covenanted for payment of the 1,600*l.* and Interest accordingly: that *Ann Constable* had been long since dead: that, by Indentures dated the 14th and 15th of November 1780,

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and expressed to be made between *Philadelphia Watkins* and *Edward Watkins*, her eldest Son, and Heir at Law of *Wm. Watkins* by *Philadelphia Watkins*, of the first part, *Sir Edward Williams* and *Edward Allen*, the Executors and Devisees of *Ann Constable*, of the second part, and *James Jenkins*, of the third part, that part of the Estates called *Gelly Vaur* were conveyed to *James Jenkins* in Fee: that *James Jenkins* afterwards died intestate, and without Issue, leaving *John Jenkins* his only Brother and Heir at Law; but the Plaintiffs were unable to discover who was his personal Representative, or whether Letters of Administration of his Estate were ever granted: that, by Indentures dated the 6th and 7th of December 1787, *Gelly Vaur* was conveyed by *John Jenkins* to *Joseph Lewis*, one of the Defendants, in Fee Simple: that, by Indentures, dated the 22d and 23d of November 1819, some Estate in *Gelly Vaur* was conveyed by way of Mortgage to *Wm. Jones*, another of the Defendants, by or by the direction of *Joseph Lewis*: that many years ago *Sir Edward Williams* and *Edward Allen*, as Devisees and Executors of *Ann Constable*, and *Philadelphia Watkins* and *Edward Watkins*, conveyed the remainder of the mortgaged Estates to *John Price*, another of the Defendants, in Fee Simple, who afterwards conveyed them to *Edward Watkins*, by way of Mortgage, for securing 2,500*l.* and Interest: that *Edward Watkins* by his Will gave his personal Estate (subject to some Legacies), and his Securities for Money, including the Estates so mortgaged to him, to his Niece, the Defendant *Sarah Jenetta*, the Wife of the Defendant *Martin William Lucas*, and her Heirs, Executors and Administrators, and appointed *Richard Constable*, *John Constable*, and *Richard Owen Stone*, Executors of his Will: that, by Settlement previous to

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the Marriage of Mr. and Mrs. *Lucas*, the mortgaged Premises, and the Money thereby secured, were conveyed to *Richard Owen Stone* and *William Owen Stone*, upon certain Trusts for the benefit of *M. W. Lucas* and his Wife, or one of them: that the several Persons claiming by the Instruments before mentioned, were, during the life of *Philadelphia Watkins*, in possession or receipt of the Rents and Profits of the Premises comprised in the Indentures of April 1755, as Mortgagees thereof, and which were much more than sufficient to keep down the Interest of the Mortgage-money; and that the whole of the Interest due on the Mortgage to *Robert Lucas* had been fully paid by means of such Rents and Profits; that, therefore, the Plaintiffs were entitled to have the Estates re-conveyed to them on payment of what remained due on that Mortgage, and to have an Account of, and be paid the amount of the Rents and Profits accrued since the death of *Philadelphia Watkins*: that the Defendants pretended that the Estate Tail, created by the Indentures of the 24th and 25th of April 1755, had been barred by a Fine levied in Easter Term 18th Geo. 3d, or in Hilary Term 3d Geo. 4th, and that the Equity of Redemption had become vested in them; but the Plaintiffs charged that such Fine, if levied, was inoperative in barring the Estate Tail, *Philadelphia Watkins* not having been a party to it, and it having been levied by *Edward Watkins* alone, who died in his Mother's lifetime, and never acquired any Estate in the Property in question: and, as to the Fine alleged to have been levied in 3d Geo. 4th, that the Estates were derived from *William Watkins*, the late Husband of *Philadelphia Watkins*; and that, although *Philadelphia Watkins* was alleged to have levied such Fine, yet that the Plaintiffs, who then were the Tenants in Tail of the

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Estates expectant upon her death, were not Parties to the Fine, or consenting thereto, and, therefore, that the Estate Tail was not barred : that the Indentures of the 24th and 25th of April 1755, or the substance and effect thereof, were well known to the Persons through whom the Defendants derived Title to the Equity of Redemption of the Premises, and were recited or referred to in the Deeds by which the Equity of Redemption was attempted to be conveyed ; and that those Deeds, and the Indentures of April 1755, were then in the possession of the Defendants : that the Defendants had in their possession divers Deeds, &c. relating to the Estates, and whereby the truth of the matters aforesaid would appear.

The Bill prayed for a re-conveyance of the Estates by the Defendants to the Plaintiffs, and for an Account, and payment to the Plaintiffs of the Rents arisen from the Estates since the death of *Philadelphia Watkins*, and of what was due in respect of the Mortgage-debts, after deducting the amount of the Rents and Profits which had been received, and were properly applicable in reduction or payment thereof, the Plaintiffs offering to pay what should remain due in respect of such Mortgage ; and for delivery up of possession of the Premises, and of all Deeds, &c. in their power relating thereto.

The Defendant *William Owen Stone*, put in a Plea to the whole of the Bill, except such parts as sought a discovery of the Purchase of the Estates by *William Watkins* ; of the execution of the Deeds of the 24th and 25th of April 1755, and whether those Deeds were in the possession of the Defendant ; as to the consideration of 980 *l.* having been paid ; as to the Mortgage to *Ann*

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Constable, by the Indentures of the 24th and 25th of June 1758; as to all the Estates comprised in the Deeds of April 1755 having been derived from *William Watkins*; as to the substance and effect of those Deeds having been known to the Parties through whom the Defendants derived their Title, and having been recited in the Deeds which conferred the Defendant's Title; as to the Estate and Interest which the Defendant claimed in the Premises; and as to the Defendant having Deeds, Papers, &c. in his possession.

The Plea was, that *Philadelphia Watkins* being seised in Tail of the Hereditaments and Premises in the Bill mentioned, and called *The Pant*, a Fine *sur conuzance de droit come ceo*, &c. was, in or as of Trinity Term 1822, levied, in due form of Law, before the Justices of the Court of Common Pleas at Westminster, between *John Price*, Plaintiff, and the said *Philadelphia Watkins*, Defendant, of the said Hereditaments and Premises called *The Pant*, by the description of three Messuages, three Gardens, three Orchards, one hundred acres of Land, fifty acres of Meadow, fifty acres of Pasture, five acres of Wood, and twenty acres of Furze and Heath; with the appurtenances, in *Llanvetherine*, and also one Annual Rent of 4*l.* 5*s.* 2*d.* issuing out of the Tenements aforesaid, upon which Fine Proclamations were duly made according to the form of the Statute in that case made and provided: and the Defendant averred that the Hereditaments and Premises, called *The Pant*, of which such Fine was levied as aforesaid, were the only part of the Hereditaments and Premises claimed by the Bill in which he claimed any Estate, Title or Interest; and that *Ann Constable* was the Sister-in-law of *Philadelphia Watkins*, being the Daughter of the Father of *Phila-*

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delphia Watkins by another Mother, and that the Purchase of the Hereditaments and Premises, called *The Pant*, by *Wm. Watkins*, was agreed for and made by him with the approbation, and on the behalf of *Ann Constable*; and that she gave and advanced to *Wm. Watkins* the Consideration-money for the Purchase thereof, upon condition that the Hereditaments and Premises should be settled and conveyed to the uses declared thereof by the Indentures of the 24th and 25th of April 1755; and that those Hereditaments and Premises were settled and conveyed to such uses, in performance of the said condition; and under the circumstances aforesaid the Defendant insisted that the Hereditaments and Premises, called *The Pant*, were derived from *Ann Constable*, and not from *William Watkins*; and he pleaded the matters aforesaid in bar, &c.

The Plea was accompanied by an Answer to those parts of the Bill that were excepted in the Plea.

Mr. Turner, for the Plea:—

This Plea and Answer will, probably, be objected to on the ground that too extensive a discovery has been given by the Answer. But, as the Bill contains a charge that the Estates were derived from *William Watkins*, it was necessary to meet that charge by Averment in the Plea, and to support the Averment by an Answer. The legal Interest in the Estates did, in fact, pass from *William Watkins*; and the Answer, therefore, could only contain a qualified denial of the Estates having been derived from him, stating the circumstances under which they were so derived. The defence, therefore, was properly framed, by excepting out of the Plea all such parts of the Bill as referred to the derivation of the

Estates from *William Watkins*. The question to be determined upon this Record is, whether these Estates can be held to have been of the Inheritance, or Purchase of *William Watkins*, so that it was not competent to his Widow to bar the Entail by Fine in consequence of the Proviso contained in the Statute 32d H. 8th, c. 36. The object of that Proviso was only to prevent Women from alienating Lands settled upon them by their Husbands, not to control their power over Lands derived from their own relations. *Eyston v. Studd* (a). There have, indeed, been some Cases where Lands, which were the absolute property of some member of the Husband's family, having been settled in consideration of Marriage and of Money paid by the Wife's Relations, the Settlement has been held to be within the Proviso in the Statute. But those Cases are distinguishable from the present. The Husband there became a Purchaser by the Marriage. In this Case, the Settlement is post-nuptial; and the Estates never were the absolute Property of the Husband. He held them only as Trustee. The Proviso in the Statute does not even reach the Case of a Settlement of Lands by a Stranger. *Ward v. Walthew* (b). Without entering into a minute examination of the Cases, it is sufficient to establish that these Estates were not of the Inheritance or Purchase of the Husband. They were not derived to him by Descent, and he did not purchase them with his own Monies. As soon as the Estates were conveyed to him, the Trust resulted to Mrs. *Constable*, who might, at any time, have filed a Bill to have the Settlement executed.

(a) Plowd. 463; 1 Inst. 366, a.

(b) Cro. Jac. 173.

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Mr. Jacob, for the Bill:—

The Plea is bad in form. The Fine is pleaded, not to the whole Bill, but to a part, the other part being answered, and the answer admitting the Deeds, &c. and facts stated in it. But, if the Plea be good, it is an answer to that part as well as to the rest. Every Plea, except a negative Plea, admits the truth of what is stated in the Bill. It cannot, therefore, be necessary to accompany it with an Answer containing Admissions. The office of an Answer in support of a Plea, is to *deny* Charges in the Bill, which, if true, would defeat the Plea: any other Answer overrules the Plea, being unnecessary, and inconsistent with the principle on which the Plea rests.

The Bill, amongst other things, calls on the Defendant to set forth what claim he makes to the Estates. If the Plea be good, *i. e.* if the Plaintiffs have no Title, he is not bound to state his Title: accordingly he pleads to this part of the Bill. But he also answers it, stating that he claims to be a Mortgagee. Here again the Plea is overruled.

The Plea is that a Fine was levied of part of the Estate, *The Part*: and it states that, as to the other parts, the Defendant claims no Interest. This ought to have been pleaded separately, as a Disclaimer. By inserting this Disclaimer in the Plea it is rendered double. It tenders two distinct Issues, as to the different parts of the Estate: with respect to one part, he declines answering, because the Plaintiffs are, he says, barred by the Fine: with respect to the other part, he declines answering for an entirely distinct reason, *viz.* because he claims an Interest.

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This species of Disclaimer, if it were good in form, would not afford a sufficient defence to that part of the Bill which it applies to. An Account of the Rents and Profits is sought. The Defendant must, therefore, answer whether he has received the Rents and Profits of that part of the Estate in which he disclaims all Interest. If he has received them, he cannot disclaim the liability to account for them.

As to the merits, the Fine was inoperative, if *Philadelphia Watkins* was, as we contend, Tenant in Tail, *ex provisione viri*, within the meaning of the Statute, 11th Henry 7, c. 20. Now the Land was purchased and settled by her Husband: the 980*l.* 10*s.* paid on the Purchase, was indeed advanced by the Wife's Sister; that did not, however, render her the Owner of the Estate; First, because part of the Purchase Money (1,500*l.*) remained on the Mortgage: and the Husband became personally liable (as between himself and the vendors) to pay that sum, or indemnify them against it. If the Estate had fallen in value below 1,500*l.*, he must have made good the difference. His undertaking this liability was part of the consideration on which the Vendors conveyed: thus the consideration for the Purchase, moved partly from him, and partly from the Wife's Sister. It is also stated by the Bill, and must therefore be taken as true, that he afterwards paid off part of the Mortgage Money; and, by the Deed of the 24th of June 1758, he covenanted to pay it off, and to convey to the uses of the Settlement.

Secondly, The 980*l.* 10*s.* is recited to have been lent or advanced to him by the Wife's Sister. It is not said that the Purchase was made by him, as Agent, or Trustee for her: but he bought, for himself, with borrowed Money. Hence, in the interval between the

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Purchase and the Settlement, he might have repaid the 980*l.* 10*s.* and have kept the Estate. It was, therefore, his Property during that time.

The Cases establish that, when the Consideration for the Purchase of the settled Lands moves partly from the Wife's relations and partly from the Husband or his relations, the Case will be within the Statute; and also that, when the Settlement is made by the Husband or his relations, the circumstance of it being partly in consideration of Money derived from the Wife's family, will not take it out of the Statute. Thus, in *Piggot v. Palmer* (c), Land was purchased for 160*l.*, of which the Wife's Father paid 140*l.*: the Settlement of this Land was held to be *ex provisione viri*. In *Kirkman v. Thompson* (d), the Wife's Father paid 200*l.* to the Husband's Father, and the latter, in consideration of that Sum, and of the Marriage, settled an Estate on the Husband and Wife, and the heirs of the body of the Wife: this was held to be within the Statute. On the other hand, when the Estate moves from the Wife's Relations, the circumstance of the Husband having paid Money which formed part of the Consideration, has been held not to bring the Case within the Statute. *Copland v. Pyatt* (e), and see *Jenk.* 319. pl. 20. (f). Thus it appears that the law has not regarded the payment of Money by either Party, but has held the Estate to have been derived from the Party by whom it was conveyed. Accordingly, it has been held that, if Money produced by Sale of the

(c) Moore, 250; 14 Vin. Ab. 551, pl. 5.

(d) Cro. Jac. 474; 14 Vin. Ab. 554, pl. 21.

(e) 14 Vin. Ab. 551, pl. 6.; Cro. Car. 244; Jo. 254.

(f) See also 14 Vin. Ab. 555, pl. 23.

Wife's Estate, be laid out in other Land, and the Husband settles the Land so purchased, it will be within the Statute (g). Where the Wife is a Copyholder, and the Husband purchases the Freehold, and settles the Estate, the Statute applies (h): the whole Estate, excepting what has been paid for the Enfranchisement, comes from the Wife, but it is held to be derived from the Husband, the Purchase and Settlement being *de facto* by him. In *Simpson v. Turner* (i) the Wife joined the Husband in barring a Settlement under which she had a Jointure of 400*l.* per annum, a new Settlement being made under which she had a smaller Jointure. The latter Jointure was thus, in fact, purchased by the Wife by the relinquishment of the former Jointure: still, as it was actually settled by the Husband, it was held to be within the Statute. In this Case the Estate was purchased and settled by the Husband; and therefore, though the consideration for the Purchase partly moved from the Wife's family, it must be regarded as an Estate derived from the Husband.

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The VICE-CHANCELLOR:—

The Plaintiffs are Issue of a Marriage between *William Watkins* and *Philadelphia* his Wife; and they claim as Tenants in Tail, under a Post-nuptial Settlement, made by the Husband, of Lands which he had purchased, and which were conveyed to him in Fee. By this Settlement an Estate was limited to the Husband and Wife, for their natural lives and the life of the

(g) Palm. 217; 14 Vin. Ab. 554, pl. 22.

(h) *Stockbridge's Case*, Cro. Eliz. 24. See 14 Vin. Ab. 549, pl. 1, in margin.

(i) 1 Eq. Ca. Ab. 220; 14 Vin. Ab. 555, pl. 25.

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Survivor, with Remainder to the use of the Heirs of the body of the Wife by the Husband. It is recited in the Settlement that the Purchase of this Estate was made by the Husband, with the approbation of the Sister-in-law of the Wife, who had advanced to him the Purchase Money upon condition that the Estate should be limited to the uses expressed in the Settlement. The actual question in the Cause is, whether the Estate Tail so limited to the Wife, is the Inheritance of the Husband given to the Wife, within the intention of the two Statutes of the 11th Hen. 7th. c. 20, and the 32nd Hen. 8th. c. 36, so that the Wife had no power to bar the Estate Tail by her Fine.

The Defendant, whose Case is now to be considered, has pleaded a Fine levied, by the Wife, of a part only of the Estate claimed by the Bill, and has averred, in his Plea, that such part is the only portion of the Estate in which he claims any Estate, Title or Interest; and he insists that in point of Law the Wife was entitled to levy this Fine. And if he be right in point of Law, and the Plea be true in fact, then, as regards this Defendant, the Plea is an Answer to the whole Case of the Plaintiffs. The Defendant has not, however, shaped his Plea as a bar to all the discovery and relief sought by the Bill; but has submitted to answer the Bill as to the several Deeds and facts upon which the Plaintiffs' Title and his own Title are founded, and as to the custody and possession of the Deeds and Papers relating thereto.

The effect of a Plea is, for the purpose of the Plea, to admit all matters stated in the Bill which are not denied by the averments in the Plea: and a Plea is a good bar

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to the whole Bill, where, admitting all such matters, the fact pleaded would be a conclusive Answer to the Plaintiff's Case. Now here, admitting every fact alleged in the Bill, if it be true that such Fine as stated in the Plea was levied, and that the Defendant has not, nor ever had any Interest in any part of the Estate not covered by the Fine, and the Law be, as this Defendant insists it is, the whole Case of the Plaintiffs against this Defendant is concluded; and the Plea, therefore, ought to have been shaped as a Plea to the whole Bill: and the consequence is that the Defendant, having answered to matter covered by the Plea, the Plea must be overruled.

It may be proper to observe that the Plea, being in effect a Disclaimer as to all the Estates claimed by the Bill, except the Land called *The Pant*, it ought to have averred, not only that he did not claim any Interest in any other part of the Property, but that he never had nor claimed any Interest in such other part; and, further, that the Plea ought not to have contained the averments which follow, as to *Ann Constable*; because these several Facts, being alleged in the Bill, are, in effect, admitted by the Plea. Generally speaking, the Court will not permit a Plea accompanied by an Answer to be taken off the File. But, as the question in the Cause may, as to this Defendant, be decided on a Plea properly framed, it is plainly for the Interest of the Plaintiffs, as well as the Defendant, that this Plea and Answer should be taken off the File, and that the Defendant should be at liberty to file a new Plea: and let the order be to that effect.

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1st June.

LOWE v. WILLIAMS.

Impertinence.

Prolixity in setting forth important documents is not impertinence, therefore, where the Defendant set forth verbatim in his Answer a state of facts, and all the Affidavits to show that the demand made in this Suit had been disallowed by the Master in a former Suit, the Court held that the Answer was not impertinent.

THE Bill was filed by the personal Representatives of *Thomas Lowe*, against the personal Representatives of *James Colclough*. It stated that, from 1808, until the 8th of April 1819, *Lowe* employed *Colclough* as his Attorney, Solicitor and Agent: That *Colclough* became entitled to make out and charge *Lowe* with divers Bills of Costs, Fees and Disbursements: That *Colclough* did not in his lifetime make out and deliver to *Lowe* any Bill of Costs, or any Account in regard to the matters aforesaid: That, in the beginning of the Year 1822, the Defendant delivered to *Lowe* what he, the Defendant, termed the general Account of all transactions between them, whereby he made out that *Lowe* was indebted to the Estate of *Colclough* in the Sum of 93*l.* 2*s.* 3*d.*: That, before the Account could be finally settled, and soon after the delivery thereof, *Lowe* died.

The Bill charged that the Account was never finally settled; that it contained charges of Interest on *Colclough's* Bills of Costs, and that in it no Credit was given for several Sums of Money therein specified, and stated to have been received by *Colclough* from *Lowe*, or on his account.

The Prayer was for an account of all the dealings and transactions, Receipts and Payments between or on account of *Lowe* and *Colclough*: that the Defendant might furnish the Bills of Costs; and that the same might be taxed, and the amount thereof, when taxed,

included in the Accounts; and that the true Balance might be ascertained; and, if found due from the Estate of *Colclough*, that the Defendant might account for his Assets, and such Assets be duly administered.

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The Defendant, in a Schedule to his Answer, set forth a Copy of the Account rendered to *Lowe* by *Colclough* in *October* 1815, and insisted upon it as a settled and stated Account. He said that, in *July* 1821, a Suit was instituted by certain Persons, on behalf of themselves and all the other Creditors of *Colclough*, against the Defendant and others for the purpose of having *Colclough's* Real and Personal Assets applied in payment of his Debts; and that, by the Decree made in that Suit in *December* 1822, the usual reference was made to the *Master* to take an Account of *Colclough's* Real and Personal Estate, and of his Debts: That, in *July* 1823, the Plaintiffs, *Thomas Lowe* and *Richard Lowe*, claiming to be Creditors of *James Colclough* in the Sum of 934*l.* 15*s.* 3*d.* brought in, in that Suit, a state of facts, in support of their Claim (the contents of which were fully set forth in the Answer), and which were, in substance, the same as those of the Bill before stated. The Answer also set forth, verbatim, an Affidavit, filed by *Lowe's* Representatives, in support of their state of facts, in which they stated Receipts given by *Colclough*, and other circumstances of Evidence, with a view to prove that *Colclough* had received every one of the Sums for which they alleged that Credit was omitted to be given in the Account delivered by the Defendant. The Answer then stated that, in opposition to the Claim made by *Lowe's* Representatives, the Defendant delivered into the *Master's* Office a state of facts, to the effect stated in an Affidavit, which was set forth, verbatim, in the Answer.

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and in which the Defendant deposed, amongst other things, that he verily believed that there was then due from *Lowe's* to *Colclough's* Estate the Sum of 235*l.* 11*s.* 8*d.*, the particulars of which were set forth in an account annexed to the Affidavit, and which he also set forth in the body of his Answer. He then said that the *Master*, after a full and fair consideration of the Plaintiffs' Claim, and Evidence in support of and in opposition to it, disallowed that Claim, and recommended the Defendant to bring an Action against the Plaintiffs for the purpose of recovering his Balance of 235*l.* 11*s.* 8*d.* and that in consequence of that recommendation he had brought an Action against the Plaintiffs for the Balance.

The Plaintiffs referred this Answer for impertinence: and the *Master* was of opinion that it was impertinent, so far as it stated at length the state of facts, and the Affidavits in support of and in opposition to it. The Defendant then excepted to the *Master's* Report.

Mr. *Agar*, and Mr. *Wakefield*, supported the Exception.

Mr. *Heald*, Mr. *Roupell*, and Mr. *Wheatley*, opposed it.

THE VICE-CHANCELLOR :—

I cannot adopt the opinion which the *Master* has in this Case expressed. The very language of these Documents, and every particular of the Claim and resistance, may prove very important in the future consideration of the present Case, and are therefore not improperly introduced, nor to be considered as impertinent. Irrelevant they cannot be called; and if they had admitted

of abridgment or general description it would subject a Pleader to insuperable difficulties if relevant matter is to be deemed impertinent wherever it is less concisely expressed than the nature of the Case necessarily requires. The safer check against abuse in length is in Costs.

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MARSACK v. BAILEY.

2d. June.

Practice.
Injunction.

AFTER a Writ of Exigent had issued, on the application of the Defendant, for the Outlawry of the Plaintiff, and four Proclamations had been made under it, the Plaintiff obtained the common Injunction. The Sheriff afterwards returned the Writ of *Exigent*, without making the fifth Proclamation, for want of another County Court before the Return; and, thereupon, the Defendant sued out a Writ of *Allocatur Exigent*, to compel the Sheriff to make the fifth Proclamation.

The Plaintiff obtained the Common Injunction after four Proclamations had been made under an Exigent issued in an Action commenced against him by the Defendant. Held that it was a breach of the Injunction for the Defendant to sue out a Writ to compel the Sheriff to make the Fifth Proclamation.

The Plaintiff now moved that the Defendant might be committed for a breach of the Injunction, in suing out this Writ.

Mr. *Sugden*, and Mr. *Ching*, for the Motion, cited *Bullen v. Ovey*. (a)

Mr. *Moore*, contra.

The VICE-CHANCELLOR :—

The Order for the Injunction stays all Proceedings at Law, with the exception that, if the Defendant is in

(a) 16 Ves. 141.

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such a condition at Law that he can demand a Plea, he is at liberty to do so, and to proceed to Trial and Judgment, with stay of Execution. Here there was no Declaration; and there could be no demand of a Plea; and the proceeding is, plainly, a breach of the Injunction. On this Writ of *Allocutur Exigent* the Plaintiff in Equity might have been arrested. The contempt not being wilful, let the Defendant supersede his Writ, and pay the Costs of the Application.

3d June.

JOHNSTONE v. URE.

Practice.
Impertinence.

An Order for referring a Defendant's Examination for Impertinence, cannot be obtained as of course, if the Plaintiff has proceeded on the Examination.

THIS was an application, by the Defendant, to discharge an Order which the Plaintiff had obtained, as of course, for referring it to the *Master* to inquire whether the Examination of the Defendant before the *Master* was impertinent, upon the ground that the Plaintiff, having proceeded before the *Master* upon the Examination, was too late to obtain this Order as of course: and, upon that ground the *Vice-Chancellor* discharged the Order.

Mr. Heald, and Mr. Wright, supported the Motion.

Mr. Horne, and Mr. Roupell, opposed it.

1826.
6th & 13th of
June.

KING v. MOODY.

*Mistake.
Copyholds.
Apportionment.*

WILLIAM FROST, the late Father of the Plaintiff *Rebecca King*, being seised in Fee of the Manor of *Brinkley* in *Cambridgshire*, and other Hereditaments, disposed of them by his Will as follows :

“ I give and bequeath to my Son *William Frost*, and his Heirs for ever, all my Houses and Lands, with all their Appurtenances thereunto belonging ; and, if the said *William* should have no Children, Child or Issue, the said Estate is, on the decease of the said *William Frost*, to become the Property of the Heir at Law, subject to such Legacies as he the said *William Frost* may leave by Will to any of the younger branches of the Family.”

The Testator died soon after the date of his Will, leaving *William Frost*, his only Son, and *Rebecca King*, his only Daughter him surviving. Upon the Testator's death, *William Frost*, the Son, took possession of the Estates devised to him, and amongst them, of the Manor of *Brinkley*. In the year 1809, whilst he was Lord of that Manor, he purchased from certain Persons named *Purchas*, an Estate, situate in and near the Parish of *Brinkley*, consisting of a Farm-house and Buildings, and 21 Acres of inclosed arable and pasture Land, and 165 Acres of arable and Lammas Land, lying, dispersedly, in the Fields of *Brinkley*. Part of these Lands was Copy-

The Lord of a Manor being seised of it in Fee, subject to an Executory Devise over, purchased an Estate, partly Freehold and partly Copyhold of the Manor, and afterwards, under an Inclosure Act, carried in two Claims, one in respect of the devised and the other in respect of the purchased Estate, and obtained two Allotments accordingly. He afterwards died, and the Executory Devise took effect : held that the Copyhold part of the purchased Estate, being extinguished in the Manor,

passed with it to the Executory Devisee, who was also entitled to so much of the Allotment obtained in respect of the purchased Estate as was proportionate to the value of the Copyhold part : and it was referred to the *Master* to apportion the Allotment accordingly.

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hold of the Manor, and the residue was Freehold, and not holden of the Manor.

In November 1809, the freehold parts of the Premises so purchased were conveyed to *William Frost*, the Son, and his Heirs; and, on 21st of the same month, the *Purchas*'s, in consideration of 650*l.* paid to them by *Frost*, the Lord of the Manor of *Brinkley*, surrendered, out of Court, into the hands of the Lord of the Manor, by the hands and acceptance of the Steward, all those 28 pieces of Land, lying dispersedly in the Fields and Bounds of *Brinkley*, *Weston* and *Winningham*, in the County of *Cambridge*, some or one of them, containing together by estimation 32½ Acres, more or less, with their Appurtenances (being the copyhold part of the Hereditaments so purchased), to the use of *Wm. Frost*, his Heirs and Assigns, according to the Custom of the Manor. This Surrender was afterwards duly presented at a general Court Baron and Customary Court of the Manor.

In 1811 an Act of Parliament was passed, intituled: "An Act for inclosing Lands in the Parish of *Brinkley*, in the County of *Cambridge*," whereby it was, amongst other things, enacted that in case any Proprietor or Proprietors of any of the Lands and Hereditaments thereby directed or authorized to be divided, allotted or exchanged, should hold his, her or their respective Lands or Hereditaments for different Estates, or by different Tenures, the Commissioners should ascertain and distinguish the Lands and other Hereditaments held for each of such Estates, and by each of such Tenures respectively, and should also set out and distinguish the different Allotments and other Hereditaments to be accepted and taken by such Proprietor or Proprietors respectively, as an equivalent in respect of each of

such Estates respectively, and that the Commissioners should set forth and declare, in and by their Award, in right of what Estates in particular such Allotments should have been respectively made; and should therein also separately describe and ascertain the situation of every such Allotment: and that, in all cases where the Proprietor or Proprietors of any of the Lands or Hereditaments which should be allotted, divided or exchanged by virtue of that Act, should hold his her or their respective Lands or Hereditaments for different Estates, or by different Tenures; and where, from the want of necessary information, or from any other cause, the Commissioners should in their Award have omitted to distinguish and ascertain the Lands or other Hereditaments holden for each of such Estates, and by each of such Tenures respectively, and to set out and award several and distinct Allotments for such Lands and other Hereditaments respectively as thereinbefore was required, or where the Commissioners should, in their Award, have mis-stated the Estate or Tenure for or by which any such Lands or other Hereditaments were or should be holden, and should have made any Allotment or Allotments for such last-mentioned Lands or other Hereditaments, it should be lawful for the Commissioners, at any time within twelve calendar months next after making their Award, upon request made to them for that purpose by any Person or Persons interested in any such omission or mis-statement, by writing under his, her or their hands, to supply or correct such omission or mis-statement, by a separate Instrument; and, so far as might be requisite for that purpose, to examine Witnesses, and to proceed and act, in every other respect, as if their Award had not been made: and, when they should have obtained such information in the matter as they might judge

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sufficient, they were thereby also authorized and required, by Deed under their hands and seals, to distinguish and set forth the true Estates and Tenures for or by which the Lands and Hereditaments in respect of which such omission or mis-statement should have arisen should be respectively holden, and to make distinct and several Allotments in respect thereof accordingly, in like manner as they were thereby required to do in their Award, as if no such omission or mis-statement had happened; and that every such separate Instrument should be annexed to their Award, and be enrolled and deposited therewith, and that evidence should be given thereof in like manner as by the Act was directed concerning their Award; and that all reasonable Expenses incurred in or about such separate Instrument should be paid by the Person or Persons who should have required the Commissioners to make and execute the same, or by his, her or their Heirs, Executors and Administrators; and that every such separate Instrument should, from and immediately after the due execution thereof by the Commissioners, have the same effect, to all intents and purposes, as if the contents thereof had been inserted and contained in their Award; and that a Duplicate of such Instrument should be delivered to the Person or Persons upon whose request any such omission or mis-statement should have been supplied or corrected, or to the Person or Persons to whom the custody of the Deeds and Writings concerning the Title of the Lands, Hereditaments or Allotments mentioned in such Instrument, should, in the judgment of the Commissioners, belong.

After the passing of this Act *Frost* delivered in to the Commissioners a Claim in writing, in which he claimed to be entitled, as well to the Hereditaments devised by

the Will of his Father, as to the Hereditaments so purchased by him. That Claim was partly as follows :
 “ Gentlemen,—I claim to be Lord of the Manor of *Brinkley*, and, as such, entitled to the Manorial Rights thereof. I also claim a freehold Farm-house and Buildings, and twenty-one Acres of inclosed arable and pasture Land, and 165 Acres of inclosed Arable and Lammas Land, lying dispersedly in the fields of *Brinkley* aforesaid, late *Purchas*’s, in my own Occupation. I also claim Common Rights to the same for one and seven Cows, upon the said Green and Common of *Brinkley*.”
 The Commissioners, by their Award, dated the 24th of January 1816, made one Allotment to *Wm. Frost* (which they described by its boundaries and number of acres), as a Compensation for his Interest, as Lord of the Manor, in the Soil and Waste Lands of the Parish; another, which they described in like manner, for his Interest, in right of his entailed Estate, in the Open and Common Fields, Commons and Waste Grounds; and a third (similarly described) in right of his Estate in Fee in the same.

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Wm. Frost, by his Will, dated the 10th of July 1810, after reciting the Will of his Father, exercised the power, given by that Will, of charging the Estates therein comprised with the payment of certain Legacies to the younger branches of the Family; and, after making various Bequests, gave all the Residue of his Manors, Messuages, Lands and Hereditaments, to *Catherine* his Wife, her Heirs and Assigns. In October 1818, *Wm. Frost*, the Son, died, leaving his Wife, and the Plaintiff, *Rebecca King*, his Sister and Heir at Law, who thereupon became the Heir at Law of her Father.

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On the decease of *Wm. Frost* his Wife took Possession of the Manor of *Brinkley*, and of the whole of the Lands so allotted under the Inclosure Act, claiming to be entitled to the same under the Will of her late Husband. She afterwards married the Defendant *Moody*. After the decease of *Wm. Frost*, the Plaintiffs, *King* and his Wife, brought an Action of Ejectment, in the Court of King's Bench, against *Frost's* Widow, to recover Possession of the Manor of *Brinkley*, and the other Property devised by the Will of *Wm. Frost* the Elder. On the Trial of this Action a special Verdict was found, which was argued in Easter Term 1820; and the Court ultimately ordered Judgment to be entered up for the Plaintiffs in the Action, which was accordingly done. Under this Judgment the Plaintiffs, *King* and his Wife took Possession of the Manor and other Estates devised by *Wm. Frost* the Father.

The Bill was filed in 1820. It insisted that the Copyhold Hereditaments having been, in manner aforesaid, surrendered to *Wm. Frost* the Younger, were absolutely merged and extinguished in the Manor; and that, therefore, he, having been, at the time of the passing of the Inclosure Act and of the execution of the Award, seised in Fee, as well of the Hereditaments which were originally of Copyhold Tenure, and which were so extinguished in the Manor, as also of the Freehold Lands so purchased by him, the Commissioners did not, in their Award, set out or declare what part of the Lands so allotted to him were allotted in lieu or in respect of the Lands which were originally of Copyhold Tenure, and what part of the said Lands were so allotted in lieu of the Freehold Lands so purchased by him.

The prayer of the Bill, therefore, was, that it might be ascertained what part of the Allotment was made by the Commissioners in respect of the Copyhold Lands so purchased and surrendered as aforesaid; and that the same might be distinguished by Metes and Bounds: and that a Commission might issue to ascertain the same; and that it might be declared that the Plaintiffs were entitled to such part of the Allotment as should be so ascertained and distinguished; and that the Defendants might be decreed to deliver up to the Plaintiffs the Possession of the same.

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The Defendants, in their Answer, after setting forth the Clause before mentioned in the *Brinkley* Inclosure Act, stated that, under that Act and the general Inclosure Act, the Award of the Commissioners, unless the same was corrected within the time and in the manner prescribed by the *Brinkley* Inclosure Act, became binding and conclusive upon all Persons to all intents and purposes: That, at the time of the passing of the *Brinkley* Inclosure Act, *Wm. Frost* was seised only of the Manor of *Brinkley* and the Lands which were parcel thereof, and which formed his entailed Estate, and of the Lands which had been purchased by him, as in the Bill mentioned, which had not merged in the Manor, and of which he was seised in Fee-simple; and it, therefore, became necessary for the Commissioners to make distinct Allotments in respect of the entailed Estate (that is to say), the Estate recovered by *King* and his Wife, and the Estate of which *Wm. Frost* was seised in Fee, and which passed by his Will to the Defendant *Catherine Moody*: and that the Commissioners, accordingly, by their Award, which was duly made and executed, and enrolled with all the formalities

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required by the said several Acts, set out and allotted to *Frost* divers Lands in respect of his entailed Estate, and divers other Lands in respect of his Estate in Fee: and that the different Allotments were, by the Award, declared to be made in respect of the different Estates, and the particular parcels of Land described in the Bill, and of which a Partition was thereby sought, were set out and allotted in respect of the Estate in Fee, as contradistinguished from the entailed Estates; and that the Award declared that the same were set out in lieu of *Wm. Frost's* Estate in Fee, by a Declaration as follows: "Which said three several Allotments we do adjudge and deem to be a just Compensation and Satisfaction for the respective Lands, Grounds, Rights of Common, and other the Rights and Interests of the said *Wm. Frost*, which he is seised of in Fee, in the Open and Common Fields, Commonable Lands, Commons, Heaths and Waste Grounds, by the said Act directed to be divided and allotted; and also in lieu of and for the following pieces or parcels of Land, or old Inclosures, hereinbefore allotted and awarded to the Rector of *Brinkley* from the Fee-simple Estate of the said *Wm. Frost* (that is to say), all that old Inclosure, called *Shrub Pasture*, N° 8, containing 4 Acres and 22 Perches, and also all that old Inclosure, called *Bob's Pasture*, N° 9, containing 3 Acres and 18 Perches; and also of and for the following piece or parcel of Land, or old Inclosure, called *Bye's Pasture*, N° 8, containing 5 Acres, 1 Rood, 34 Perches, hereinbefore assigned, allotted and awarded to the entailed Estate of the said *Wm. Frost* from the Estate of which he is seised in Fee." The Answer further stated that all the several parcels of Land particularly described in the Extract from the Award, were parcel of the Freehold Lands purchased

by *Wm. Frost*, and not of the Copyhold purchased by him: That, thereby, the Commissioners set out the Allotments, particularly described in the Bill, in respect of the Lands which passed to the Defendant *Catherine Moody* under the Will of *Wm. Frost* the Son, those being the only Lands of which he was seised in Fee, as contradistinguished from his entailed Estate: That no objection was ever made to the Award by the Plaintiffs, or any Persons interested under the Will of *Wm. Frost* the Elder; and that the same was never altered by the Commissioners in the manner, in which, if any mistakes were made by them, they were enabled to correct the same; and that the same was binding and conclusive upon the Plaintiffs and all other Parties.

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Mr. *Sugden*, and Mr. *Rolfe*, appeared for the Plaintiffs:

Mr. *Horne*, Mr. *Pemberton*, and Mr. *Biggs Andrews*, for the Defendants.

It is unnecessary to insert the Arguments at length, as the substance of them is stated in the Judgment.

The Cases cited were *St. Paul v. Lord Dudley and Ward* (a), for the Plaintiffs, and *Morgan v. Mather* (b), and *Knox v. Simmonds* (c), for the Defendants.

The Evidence alluded to in the Judgment was that of one of the Commissioners, and their Clerk. It related to the Claim made by *Frost* before the Commissioners, and the representations, made by him on that occasion.

(a) 15 Ves. 167.

(b) 2 Ves. jun. 15.

(c) 3 Bro. C. C. 358; S. C. 1 Ves. jun. 369.

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that he had an Estate Tail in the devised Lands, and an Estate in Fee in the others. The ground of the objection to this Evidence was that it tended to contradict the Award.

The VICE-CHANCELLOR:—

In this Case, *William Frost*, Lord of the Manor of *Brinkley*, as Tenant in Fee, with a Gift over by way of Executory Devise, purchased a certain Estate, partly Freehold, and partly Copyhold, held of the Manor of *Brinkley*, the Freehold part of which was duly conveyed, and the Copyhold part duly surrendered to him and his Heirs; and it is not denied that, by the effect of this Surrender, the Copyhold, at Law, became annexed to and parcel of the Manor, so as to be subject to the Executory Devise of the Manor. It is proved in the Cause, by Evidence, which was objected to, but which I considered myself bound to admit, that an Act of Parliament afterwards passed for inclosing Lands in the Parish of *Brinkley*; and that *William Frost*, mistakenly considering that, by the effect of his Purchase and the surrender to him, the Copyhold, as well as the Freehold which he had purchased with it, had become his fee-simple Estate, carried in to the Commissioners under the Inclosure Act two Claims, one for his entailed Estate, meaning thereby the Estate limited over by way of Executory Devise, excluding therefrom the Copyhold which had become parcel of the Manor, and the other, for his Estate in Fee, including in the description of the latter Estate the Copyhold part of the purchased Estate; and the Commissioners, adopting his mistaken view of the Case, made two distinct Allotments for what he called his entailed Estate, and for what he called his Estate in Fee, including in the latter an Allotment

in respect of the Copyhold part of the Estate purchased.

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William Frost is since dead; and the Executory Devise over of the Manor of *Brinkley* having taken effect in favour of the Plaintiffs, the present Bill is filed for the purpose of having it determined what part of the Allotment so professed to be taken for the Estate in Fee of *William Frost*, is to be considered as having been made in respect of what had been Copyhold, the Plaintiffs insisting that such Copyhold having become parcel of the Manor, they, and not the Defendants, who are the general residuary Devisees of *William Frost*, are entitled to this portion of the Allotment, and the Case of *St. Paul v. Lord Dudley*, is relied upon by them as in point.

For the Defendants it has been first argued that the question, whether, by the Surrender, the Copyhold did or not become parcel of the Manor, is a mere legal question, and that the Plaintiffs ought to be left to Law. The obvious answer is, that one Allotment being made in respect of the whole purchased Estate, the Plaintiffs cannot recover, at Law, any particular portion of the Allotment, as belonging to the part which had been Copyhold, and the Plaintiffs are, necessarily, driven into Equity in order to have a certain parcel of the Allotment set out by a Court of Equity, as being equivalent to the proportionable value between the Freehold and Copyhold.

It is next argued that *William Frost*, by including in his Claim what had been Copyhold, as a part of his own Estate in Fee, plainly manifested that it was not his

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intention that it should become parcel of the Manor, but should remain at his disposal; and, as he had the power, during his life, to separate it again from the Manor, it is to be inferred that he would have done so if he had not mistaken the Law; and that a Court of Equity, therefore, will not assist the Plaintiffs against the actual intention of the real Owner of the Property.

Where, by Law, a certain Act is necessary in order to give effect to intention, Courts of Justice are disinclined to infer a perfect intention where the Act required is not done, as in the case of a Will of Lands not duly attested; and, in the Case referred to, Lord *Dudley*, as to the Copyhold within the Manor of *Kingswinford*, had manifested the same ignorance of the Law, and the same intention that the Copyhold purchased and surrendered to him should not be annexed to and descend with the Manor, by comprising it in the Mortgage to *Smith*, for the sum of 8,000*l.* borrowed by him; and, though the Lord Chancellor held that the Mortgagee might have compelled the Remainder-man to re-grant the Copyhold, according to the Covenant to Surrender in the Mortgage Deed, yet no such re-grant having been made, he was of opinion that Lord *Dudley's* general Devisees had no Equity against the Remainder man. If, in such cases, the Devisee has no Equity, it can make no difference whether the Remainder-man be Defendant, as in the Case of *St. Paul v. Lord Dudley*, or Plaintiff, as in this Case.

Declare that the Plaintiffs are entitled to so much of the Allotment, professed to be made in respect of the Estate in Fee of *William Frost*, as was actually made in respect of the Copyhold Land surrendered to him and his

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Heirs by *John Purchas*, the Elder, and *John Purchas*, the Younger, and *William J. Purchas*, on the 21st of November 1809; and refer it to the *Master* to apportion the said Allotment accordingly; and let the Defendant deliver up to the Plaintiffs the Possession of that part of the Allotment which the *Master* shall so apportion to the Plaintiffs in respect of the said Copyhold Lands; and let the *Master* take an Account of the Rents and Profits of the said Allotment which have arisen, or become due, since the death of the said *William Frost*; and let him apportion the said Rents and Profits, and ascertain and state how much of such Rents and Profits is to be attributed to that part of the said Allotment which he shall find to belong to the Plaintiffs, according to the Declaration aforesaid; and let the Defendants pay the amount of such Rents and Profits to the Plaintiffs, *Robert King* and *Rebecca* his wife; and let any Party interested be at liberty to apply as they shall be advised.

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1826.
8th June.

PARKER v. FEARNLEY.

Will.
Construction.

Testatrix directed her Legacies to be paid by her Executor to whom she afterwards gave all her real Estates, and the residue of her personal Estate after payment of her debts and funeral Expenses. Held that the Legacies were not charged on the real Estates.

MRS. ALICE FEARNLEY bequeathed her Household Furniture, Plate, China, Linen and Wearing Apparel, and a sum of 600*l.* to her Daughter, *Ann Parker*. She also bequeathed to another of her Daughters the sum of 100*l.* and gave several small Legacies to other persons. She then directed that the Legacies which she had given should be paid within two Years after her decease, by her Executor thereafter named, to such of the Legatees as should then have attained the age of twenty-one years, and to the others as and when they should attain that age. She next devised a real Estate, which she particularly mentioned, and all other her real Estates, unto her Son *Charles*, in Fee; and, as to all the rest and residue of her said personal Estate which should remain after payment of her just Debts and Funeral Expenses, she gave the same to her said Son, for his own use and benefit, and appointed him sole Executor of her Will.

The Bill stated that the Testator's personal Estate, at the time she made her Will, was very small; and insisted that the Legacies were well charged on the real Estate.

The Defendant, *C. Fearnley*, put in a general Demurrer to the Bill.

Mr. *Sugden*, and Mr. *Swanston*, in support of the Bill.

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Mr. *Heald*, and Mr. *Sidebottom*, in support of the Demurrer, were stopped by the Court.

The Court cannot take into consideration the amount of the personal Estate, nor indulge conjectures as to the intention of this Testatrix, but must be governed by her expressions; and there is no expression in this Will which would justify me in stating that it was the intention of this Testatrix that her pecuniary Legacies should be Charges on her real Estate devised to her Executor. I cannot infer that the Legacies were to be so charged, because she has directed that her Legacies should be paid by her Executor; for, by Law, pecuniary Legacies are to be paid by him: nor because she has made her Executor the residuary Legatee of her personal Estate,

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after payment of her just Debts and funeral Expences, without mentioning Legacies; for pecuniary Legacies are imposed, by the Law, upon the residue of the personal Estate, after the payment of just Debts and funeral Expences: and the omission of such direction in the Will is immaterial, unless there be words in the Will directly affecting the real Estate.

30th May, and
8th July.

THE TRUSTEES OF THE BRITISH
MUSEUM v. WHITE.

*Mortmain.
Charity.*

A Devise to the *British Museum* is within the Stat. of *Mortmain*; and so is every Devise for a public purpose, whether local or general.

WILLIAM WHITE, deceased, devised a Freehold Estate to Trustees, in Trust to sell it, and pay the Proceeds, together with his residuary Personal Estate, to the Trustees of the *British Museum*, to be by them employed for the benefit of that Institution. The question was, whether this Devise was void under the 9th Geo. 2d. c. 36?

The *Solicitor-General*, Mr. *Bligh*, and Mr. *Coote*, for the Trustees of the *Museum*:—

The *British Museum* is not a charitable Institution. It was founded by the munificence of the State for the benefit of the Public. Every Gift for the use of the Public is not, necessarily, a Charity. There must be something in the nature of Relief to constitute a Charity. Gifts to support a public Bridge, and for the repair of Sea-banks, have, on that principle, been held to be charitable Gifts. So Schools for learning have

been held to be charitable Institutions : not so Schools of Art (*a*). Now this is a School of Art. Besides, the *Museum* is national Property : and, for that reason, it was held, in *Thellusson v. Woodford* (*b*), that the Devise to the King, for the use of the Sinking Fund, was good.

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But if the *British Museum* should be held to be a charitable Institution, still this Devise is good, under the 26th Geo. 2d. c. 22, by which the *Museum* was established : for it is thereby enacted (*c*) : “ That, for the better execution of the purposes of this Act, the said Trustees, hereby appointed, shall be a Body Politic and Corporate in deed and name, and have succession for ever, by the name of ‘ The Trustees of the *British Museum* ;’ and, by that name, shall sue and be sued, implead and be impleaded, in all Courts and Places within this Realm, and shall have power to have and use a common Seal, to be appointed by themselves, and to make Bye-laws and Ordinances, for the purposes of this Act ; and to assemble together, when, where, and as often, and upon such notice, as to them shall seem meet, for the execution of the Trust hereby in them reposed ; and shall also have full power, capacity and ability to purchase, take, hold and enjoy, for the purposes of this Act, as well Goods and Chattels, as Lands, Tenements and Hereditaments, so as the yearly value of such Lands shall not exceed 500*l.* above all Charges and Reprizes, the Statute of Mortmain, or any other Statute and Law to the contrary thereof, in any wise notwithstanding.”

¶

(*a*) Duke, 128.

(*b*) 4 Ves. 227.

(*c*) Sec Sect. 14.

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Mr. *Horne*, and Mr. *Parker*, for the Defendant, the Testator's Heir, contended that the *British Museum* was no more national Property than a Hospital, or College of Royal Foundation; and that the Devise in question was void, as being within the Statute of *Mortmain*.

The VICE-CHANCELLOR :—

It has long been settled, by authority, that a Gift of the price of Land is, in effect, a Gift of Land within the 9th *Geo.* 2d.; because it is possible that the Land itself may be acquired by means of such a Gift. In Mr. *Thellusson's* Will there was a residuary Gift, in certain events, towards payment of the National Debt: but those events have not yet happened, nor probably ever will happen; and no decision has yet taken place with respect to the validity of that Gift. But, in this Will, there is no such Gift to the Nation; but a Gift to an Institution, established by the Legislature, for the collection and preservation of objects of Science and of Art, partly supplied at the public Expence, and partly from individual liberality, and intended for the public improvement. I consider that every Gift for a public purpose, whether local or general, is within the 9th *Geo.* 2d., although not a charitable Use within the common and narrow sense of those words: and, consequently, I must declare this Devise void as to the Real Estate. (e)

(e) See *Att. Gen. v. Heelis*, ante 67.

BLOMMART v. PLAYER.

1826.
10th July.

THOMAS GREGORY PLAYER, being seised of certain Freehold and Copyhold Estates, by his Will gave all his Real and Personal Estate of every description whatsoever, and whether in possession, reversion, remainder or expectancy, with all the Appurtenances thereto belonging, unto his Wife *Isabella Player*, her Heirs, Executors, Administrators and Assigns.

Election.

The Testator left a Son, who was his Heir at Law and customary Heir, and two Daughters, surviving him. The Widow, at the death of the Testator, entered into the possession of all her late Husband's Real Estates, including the Copyholds; and, being so in possession, she, by her Will, devised to the Plaintiffs all the Freehold and Leasehold Lands, late of or belonging to her late Husband, and all and singular the Personal Estate, late of or belonging to her late Husband, and all other her Real and Personal Estate whatsoever, except any Copyhold Messuages, Lands, Tenements and Hereditaments of, or to which she was, or should or might be seised or entitled, upon Trust to sell and convert the same into Money: and she then empowered and required her Trustees to sell and dispose of all such Copyhold Messuages, Lands and Tenements as then were, or thereafter should or might be vested in her, and every part thereof, with their Appurtenances; and directed that the Monies arising from all the said

Where it was not apparent on the face of the Will, that a general Devise in Trust to sell was intended to include a particular Estate, of which the Testatrix had been wrongfully in possession up to the time of her Death, the rightful Owner of that Estate was not put to his Election in respect of an interest bequeathed to him in the Money to be produced by the sale of the Estate.

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Property so to be sold and converted by her Trustees, should be divided into three parts, and she gave one third part thereof to her Son, and the other two parts to her Daughters.

The Son, after her death, claimed the Copyhold Lands, which had belonged to his Father, and been enjoyed by his Mother, upon the ground that they did not pass to his Mother by his Father's Will, and, ultimately, recovered possession of them in an Action of Ejectment in the Court of Common Pleas.

The Bill was filed by the Testator's two Daughters, praying that the Trusts of the Mother's Will might be carried into effect, and that it might be declared that the Copyholds passed, by the Father's Will, to the Mother, or that the Son was bound to elect between the Copyholds, and the third part of the produce of the Property directed to be sold, which was given to him by the Mother's Will.

The *Solicitor-General*, Mr. *Heald*, Mr. *Shadwell*, Mr. *Roupell*, and Mr. *Bickersteth*, for the Plaintiffs.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Rayley*, for the Defendant, the Son.

THE VICE-CHANCELLOR :

It having been decided, by the Court of Common Pleas, that the Copyholds did not pass to the Mother by the Father's Will, this Court will not review that Judgment. If the Judgment be complained of, the

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proper course is to review it, by Writ of Error, in the Exchequer Chamber.

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There is no Election, unless it be manifest, upon the face of the Will, that the Mother intended to pass, by her Will, the Copyholds which had belonged to the Father. Her direction to the Trustees is, that they are to sell and dispose of all such Copyhold Messuages, Lands and Tenements as then were, or thereafter should or might be vested in her. According to the Decision of the Court of Common Pleas, the Copyholds which had belonged to the Father were not then, or at any time thereafter, vested in her : and there is not, therefore, any intention, apparent upon the face of the Will, that the Copyholds, which had belonged to the Father, should pass thereby. It must, therefore, be declared that the customary Heir is not put to his Election.

1825.
6th December.

31st May 1826.

Trust.
Equity of Re-
demption.
Evidence.

JAMES v. BIOU.

OWEN v. FLACK.

A Trustee in receipt of the Rents and Profits of a mortgaged Estate, under an old Conveyance of the Equity of Redemption, upon Trust to sell and pay off certain Debts which had been long since satisfied, is not entitled to redeem the Mortgage.

Evidence.

Payment of Money, though Evidence against the Payer of the title of the Party receiving it, is not Evidence against the Receiver

that the Payer was the Party bound to pay it.—The suppression of some of a series of Documents relating to the Title, which are admitted to be in the possession of a Party, is Evidence that the Documents withheld afford inferences unfavourable to the Title of that Party.

THIS was an original and revived Suit for the redemption of mortgaged Estates, and for a Re-conveyance upon the Trusts of certain Deeds executed in the year 1781.

The original Bill was filed in November 1817 (a), and the Case made by it, and by a Bill of Revivor and Supplement, was, in substance, that, in 1781, *Sewell Mansell* was seised in Fee of the Estates in question, subject, as to part, to a Mortgage in Fee for securing 300*l.* and Interest, and, as to other part, subject to a Mortgage in Fee for securing 400*l.* and Interest; that, in July 1781, these two Mortgages were vested in *Susannah Biou*, the Defendant to the original Bill, and *Frances Biou*, deceased; that, for many years previous to 1781, *Sewell Mansell* had regularly paid the Interest on these Mortgages to *Susannah* and *Frances Biou*; that, in 1781, an Agreement was entered into between these Parties, for increasing the rate of Interest on the Mortgages from four per cent. to five per cent. per annum:

(a) See *James v. Biou*, 3 Swan. 234.

That, by Indentures of Lease and Release, dated the 30th and 31st of July 1781, made between *Sewell Mansell* of the one part, and *Abel Jenkins* of the other part, *Mansell* conveyed the mortgaged Estates to *Jenkins* in Fee, upon Trust to sell them, and apply the Money to be produced by the Sale in the manner directed by another Indenture of even date, which was made between the same Parties, and by which, after reciting the Conveyance to *Jenkins*, and the two Mortgages for 300 *l.* and 400 *l.*, and several other Incumbrances and Annuities to which the Estates were subject, it was declared that *Jenkins* should stand possessed of the Money to be produced by the sale of the Estates, and of the Rents and Profits of them until they were sold, upon Trust, out of the Rents and Profits, to keep down the interest of the Mortgages and other Incumbrances, and then to satisfy and pay off the principal Monies due in respect of the Mortgages and other Incumbrances, and to apply the Surplus in payment of the Debts of *Sewell Mansell* mentioned on the back of this Indenture, and to pay what might remain of the Money produced by the Rents and Profits, and by the Sale, after these various payments, to *Sewell Mansell*, his Executors, Administrators and Assigns; that there were no Debts mentioned on the back of the Indenture, but that *Abel Jenkins* paid off the various Debts which were in the contemplation of the Parties at the time of the execution of these Deeds, and also the various Incumbrances affecting the Estate, except the Mortgages for 300 *l.* and 400 *l.* and one Annuity, and during his life-time paid all the Interest due on the Mortgages as well as the Annuity; that *Abel Jenkins* died in 1802, having devised to *James* and *Owen* (the Plaintiffs in the original Suit) all his Freehold, Copyhold and Leasehold Estates, upon Trust to sell, and directed that the Money to be

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produced by the Sale should be considered part of his Personal Estate, and he gave the residue of his Personal Estate to the Plaintiffs *Abel Jenkins* and his Sister, *Mary* the Wife of *Charles Abbott*, and appointed the Plaintiffs *James* and *Owen* Executors of his Will; that *Abel Jenkins*, the Testator, left the Plaintiff *Abel Jenkins*, one of his residuary Legatees, his Heir at Law; that the mortgaged Estates, upon the death of the Testator *Abel Jenkins*, either passed, by his Will, to the Plaintiffs *Owen* and *Jenkins*, as his Devisees, or descended to the Plaintiff *Jenkins*, as his Heir at Law, subject to the Incumbrances still affecting them, and to the Trusts of the Deeds of July 1781, so far as the same were unperformed; that *Susannah Biou*, having survived her Sister, became entitled to all the Interest in the Mortgages of 400*l.* and 300*l.*; and, by her Will, bequeathed these Sums, and the Securities for the same, to the Defendant *Flack*, together with all the Title Deeds of the mortgaged Estates; and directed that, as these Mortgages had been sixty-three years in her Family, the Title Deeds should not be delivered up to any one but the next legal Heir; that *Sewell Mansell*, at the time of executing the Deeds of July 1781, was seised in Fee of the Equity of Redemption, and that the Plaintiffs were entitled to redeem, and that he had been in possession and receipt of the Rents and Profits up to the time of executing those Deeds; and that, ever since, *Jenkins*, the original Trustee, and the Plaintiffs had been in receipt of the Rents and Profits; and that *Susannah Biou* and her Sister had frequently admitted the title of *Mansell*, *Abel Jenkins*, and of the Plaintiffs to redeem, as well by entering into the Agreement to increase the rate of Interest, as by receiving payment of the Interest, and granting Receipts for it as received from the Parties entitled to the Equity of Redemption.

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The Bill prayed for a Redemption of the mortgaged Estates, and a Re-conveyance of them upon the subsisting Trusts of the Indentures of July 1781, or such other Conveyance as the Court should direct.

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The Receipts referred to in the Bill were set forth in a Schedule, and bore date during the period between 1776 and 1781; in 1802 and 1803; and from 1811 to 1816.

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The Answer of *Susannah Biou* to the original Bill, stated that *Abel Jenkins*, the original Trustee, had been in receipt of the Rents and Profits of the Estate, and had paid Interest on the Mortgages, as the Agent or Steward of the Mortgagor; and that he never, in his life-time, claimed to be entitled to the Equity of Redemption; that the title of *Sewell Mansell* to the Equity of Redemption was never made out; that she admitted he was, in 1781, seised of the Equity of Redemption, but whether he was seised in Fee, or how otherwise, she could not set forth; that the Receipts set forth in the Bill had been brought to her ready prepared, and were signed by her as a matter of course, and, therefore, ought not to conclude her from requiring the Plaintiffs to show their Title; that the Plaintiffs had offered to show her those Receipts, but that the Receipts, signed between 1781 and 1802, and between 1803 and 1811, had not been produced to her, and were withheld from her inspection; that she admitted the Indentures of July 1781, but denied any Agreement with *Mansell* for increasing the Interest, further than that, two years previous to its being increased to five per cent., she had applied to *Abel Jenkins* to have it increased, who promised to procure an advance of Interest, and that it was afterwards advanced to five per cent accord-

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ingly; and she denied that the Plaintiffs had any title, even if it were true that *Sewell Mansell* had good title to convey in Fee according to the Deeds of 1781.

No Witnesses were examined on either side.

Mr. *Hart*, Mr. *Heald*, and Mr. *Boteler*, for the Plaintiffs:—

Mansell, by the Conveyance of July 1781, vested in *Jenkins* all the rights of Redemption that he had himself. He expressly directs *Jenkins* to redeem the Mortgages, in the first place. It is true that the Estate has never been sold: but, for any thing that appears to the contrary, *Jenkins* may have vested in himself all the Securities that the other Incumbrancers held, and, therefore, did every thing that he intended to do. When neither *Mansell* nor his Representatives require the Trusts to be performed, what right can Mrs. *Biou* have to do so? How can it concern her to know who are the persons entitled to this Estate? If *Jenkins* had tendered the Principal and Interest due on the Mortgages, could she have refused to receive it, and insisted upon his executing all the Trusts? She and all the other Incumbrancers have no Interest in the Estate except to see themselves paid. At all events, by continuing to receive the Interest for so long a period, she has precluded herself from disputing the Plaintiffs' right to redeem.

Mr. *Sugden*, and Mr. *Wakefield*, for the Defendants:—

From what fell from the *Lord Chancellor* when this Cause was before him (*b*), it is clear that the impression

(*b*) See 3 Swan. 237.

on his Lordship's mind was, that it is not sufficient, for a person coming to redeem a mortgaged Estate, to say that he had got a Conveyance of it as a Trustee; but that the Mortgagee had a right to hold the Estate until a right to redeem it was shown. No attempt has ever been made to carry the Trusts of the Indentures of July 1781 into execution. It is now forty-four years since those Trusts were created, and they have all long since ceased. If those who now represent Jenkins mean to enforce their claim, they ought to have brought the *cestui que* Trusts before the Court. This is not a question between the real Owners of the Estate, but the claim is made by persons deriving their Title under a mere naked Trustee. If any person has a right to redeem this Estate, that right must be vested in one of the *Mansell* family.

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The VICE-CHANCELLOR:—

This Bill is filed by the Plaintiffs for the purpose of redeeming two Mortgages, now vested in the Defendant. The title of the Plaintiffs to redeem these Mortgages is founded upon a Conveyance, made in July 1781 by *Sewell Mansell* (whom the Plaintiffs assert to have been then well entitled in Fee-simple to the Equity of Redemption of the mortgaged Property) to *Abel Jenkins* and his Heirs, upon Trust to sell, and pay off certain Charges and Incumbrances, including the Mortgages in question, and to pay the Surplus of the produce of the Sale to *Sewell Mansell*, his Executors and Administrators.

The Defendant admits that *Sewell Mansell* had some Interest in the Equity of Redemption at the time of this Conveyance, but is ignorant what the nature of that Interest was; and calls upon the Plaintiffs to prove that he had good title to convey in Fee, according to the

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Deeds of July 1781 : and the Defendant contends that, admitting *Sewell Mansell* had good title to convey in Fee according to the Deeds of July 1781, yet that the Plaintiffs have now no right of Redemption. Two of the original Plaintiffs were Devisees in Trust, and Executors under the Will of *Abel Jenkins*, and the other Plaintiff is the Heir at Law of *Abel Jenkins*. In order to prove the title of *Sewell Mansell* to make the Conveyance in question, the Plaintiffs do not read the qualified admission in the answer of the Defendant, but produce certain Receipts, signed by the Defendant, for Interest-money paid to her upon her Mortgages, in which, for four years prior and down to 1781, she acknowledges to have received the Interest of Mr. *Mansell* by the hands of Mr. *Jenkins*; and, in two of such Receipts, it is stated to be for Interest due on Mortgage of his Estate. The Defendant alleges that these Receipts were written by Mr. *Jenkins*, who acted as Steward of the mortgaged Estates, and that, being satisfied with the regular payment of the Interest, she did not enter into any critical examination of the language, but readily signed the Receipts as they were produced to her.

Payment of
Money is Evi-
dence against
the Payer of the
title of the
Party receiving
it, but is not
Evidence

against the Receiver, that the Payer was the Party bound to pay it.

The suppression of some of a series of Documents admitted to be in possession of the Party who produces the others, is Evidence that the Documents withheld afford inferences unfavourable to that Party who withholds them.

If a person pays Money to another, it must be presumed that the person paying has inquired into and is satisfied with the title of the Receiver, and the fact of payment is, therefore, Evidence against the Payer of the title of the Receiver. But a person not paying, but receiving payment in respect of a just demand, may well assume, without inquiry, that the person who tenders the

Money in payment, is legally bound to pay it; and the fact of Receipt is not, therefore, the same Evidence of the title of the Payer, as the fact of payment was, in the other case, of the title of the Receiver.

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It is further to be observed that the Receipts given by the Defendant to *Abel Jenkins*, from the execution of the Deeds of 1781 until his death in 1802, though admitted to be in possession of the Plaintiffs, are not produced; and the suppression of them is Evidence that these Receipts afford inferences unfavourable to the title of the Plaintiffs. The Receipts, after the death of *A. Jenkins*, state the Interest to have been received from his Executors. But, under the Conveyance of 1781, the Trusts descended to his Heir at Law; and the Receipts, if they had been conformable to the Title, would have expressed that the Interest was paid by the Heir at Law. In the particular case, therefore, the language of the Receipts is not to be relied upon.

But the Defendant further objects, as I have stated, that, admitting *Sewell Mansell* to have had good Title to make the Conveyance of 1781 to *Abel Jenkins*, yet the Plaintiffs have now no right of Redemption under it. At Law, the Plaintiffs, or one of them, as owners of the Fee, would have all the Rights incident to the quality of their Estate, and, consequently, the right to redeem the Defendant's Mortgages. But, in Equity, the Plaintiffs, being Trustees, have only such rights of Property as are expressly given to them, or are required for the execution of their Trusts. The Plaintiffs, in the Bill, state that all the Charges and Incumbrances intended to be provided for by the sale of the Estate in 1781, are either extinct by the death of the Annuitants, or have been satisfied from the Rents and Profits, except the Mortgages due to

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the Defendants, and such Charges of the Trustee as may have arisen in the execution of the Trust, without stating that any such Charges have arisen. It is now nearly forty-five years since this Trust was created, and never having yet been executed, and the principal purpose of the Sale answered without it, it must be presumed that the intention of the Trust has long been abandoned by those who are now interested in the Estate, and such persons are not made parties to the Suit in order to sustain the right of Redemption. It might be difficult to make out how the redemption of these Mortgages would be a necessary act in the execution of the power of Sale, if the Trusts subsisted. But, if the Trusts are to be presumed to be determined, and the Plaintiffs have no power of Sale, then, consequently, they can have no power of Redemption, which they could only claim as ancillary to the power of Sale.

Bill dismissed, with Costs.

29th July.

*Practice.
Opening
Biddings.*

A Purchaser who has confirmed his Report *nisi*, and then is served with a notice of Motion to open the Biddings, cannot confirm his Report absolutely.

VANSITTART v. COLLIER.

A PURCHASER obtained the Order *nisi* for confirming his Report. Before the Report was actually confirmed he was served with notice of a Motion for opening the Biddings, and nevertheless proceeded to confirm his Report. The Court was now moved to discharge the Order for confirmation, and the *Vice-Chancellor* discharged it accordingly, on the authority of a Case of *Watson v. Brickwood*, 6th February 1808, with which he had been furnished by Mr. *Walker*, the Register.

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ACCOUNT.

WHERE the plaintiff filed his bill for an account of the captain's profits of a voyage to India in one of the Company's ships, to a share of which the plaintiff was entitled under an agreement with the captain, and it was alleged by the captain's executors that the agreement was made in consideration of the plaintiff having procured for the captain the command of the ship, this Court directed an issue to ascertain the consideration, reserving the question whether such an agreement would or not be void. [*Money v. Macleod.*] 301

ADMINISTRATION.

1. Where a partner dies leaving the partnership accounts unsettled, the Ecclesiastical Court will grant administration of his effects to the surviving partners, or any persons claiming under them, if his next of kin decline it. [*Cuthorn v. Chabé.*]

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2. A testator resident in India, and

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having all his property there, bequeathed his residuary estate to *H. L.*; but if she should die before him, then to her children. *H. L.* died before the testator and the executor, who was also resident in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to *H. L.* or her children. A suit having been instituted by the children, who were infants, against the executor and his agents to have the residue secured, held that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit. [*Logan v. Fairlie.*]

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See ASSZRS.

ADVANCEMENT.

A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it, and afterwards persuaded his son to continue the trade against his

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inclination, whereby the son suffered great losses. The father on his death-bed caused the promissory note to be burned, and died intestate: held that the burning of the note amounted in equity to a release of the debt, and that the sum which remained due upon it was an advancement to the son. [*Gilbert v. Wetherell.*] - - - - 254

AGREEMENT.

1. In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed without the introduction of any new or different term. [*Holland v. Eyre.*] 194
2. A tenant for life of real estate, with remainder to his children, as he should appoint remainder to them in fee, entered into an agreement with a creditor, to which his children were parties, that the estate should be immediately sold, and one half of the produce paid to the father, and the other half to the children. The father remained in possession for seven years, and then died without having taken any step to carry the agreement into effect. A bill by the personal representative of the creditor against the children and representative of the father to have the agreement carried into effect, was dismissed on the ground that the father, by continuing in possession of the estate, deprived

his daughter of the benefit of the agreement. [*Rhodes v. Cook.*] 488
See ACCOUNT. CHAMPERTY. HUSBAND AND WIFE, 4. SPECIFIC PERFORMANCE, 5.

AMENDMENT.

Plaintiff by his original bill sought to set aside a deed. After the answer was filed he, under the usual order, amended the bill by making quite a different case, and sought to establish the deed. The Court ordered him to pay the costs of the original bill, and of certain accounts set forth in the answer, in compliance with the prayer of that bill, and the costs of the motion. [*Mavor v. Dry.*] - - - - 113
See PRACTICE, 2. COSTS, 3.

ANNUITY.

Unless a defect in the memorial of an annuity is stated in the pleadings or evidence, no advantage can be taken of it. [*Dunn v. Calcraft.*] 56

ANSWER.

1. An answer as to matters to which the defendant was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a stranger to and could not form any belief respecting them is, sufficient. [*Amhurst v. King.*] 183
2. The bill alleged that a bill of exchange held by the defendant was an accommodation bill, and required

- him to set forth the particulars of the consideration pretended to be given for it; the answer denied the allegation, and stated that the bill of exchange was paid to the defendant in the regular course of his business as a banker, and that the consideration did not consist of any specific sum, but of cash from time to time drawn out by the payer: held that this was a sufficient answer, and that it would have been impertinent in the defendant to set forth the general banking account. [*Webster v. Threlfall.*] - - - 190
3. A defendant may file a further answer before the master has signed his report as to the insufficiency of the first answer. [*Wynne v. Jackson.*] - - - - - 226
4. A defendant cannot, by answer, protect himself from answering fully, on the ground of his being a purchaser for valuable consideration. Where a plaintiff takes no exception to the answer to the original bill, he cannot take an exception to the answer to the amended bill, upon a principle which would have applied equally to the answer to the original bill. [*Ovey v. Leighton.*] 234
5. Exceptions to an answer, containing in substance, but not verbatim, the interrogatories not answered will be overruled; but if the defendant has submitted to answer, and his further answer is referred back, he is too late to object to the form of the exceptions. [*Hodgson v. Butterfield.*] - - - - - 236
6. Fourteen directors of a joint stock company, against whom a bill was filed by a shareholder in the company for an account and dissolution of the concern, having filed fourteen separate answers, with long schedules to each, each of the answers and schedules being nearly verbatim the same, and the defendants appearing all by the same solicitor, who had threatened to ruin the plaintiff by the costs of the suit; the Court directed a reference to the Master to ascertain whether it was necessary or expedient, with a view to the defence, that separate answers should have been filed. [*Vansandau v. Moore.*] - - - - - 509
- See COMMISSION, 1.
- APPEAL.
- No appeal lies to the Court of Chancery from the decisions either of the Privy Council or of the Commissioners under the Acts and Conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government. [*Hill v. Reardon.*] - 431
- APPEARANCE.
- If a person who is named as a defendant, but has never been served with a subpoena, or appeared to the bill, appears by counsel at the hearing and consents to be bound by the

decree, the defect is cured. [*Capel v. Butler.*] - - - - - 457

APPOINTMENT.

Where a power was to be executed by a will signed and published in the presence of, and attested by three witnesses: held that a will concluding with this declaration, "This is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested. [*Stanhope v. Keir.*] - - - - - 37

See PORTIONS.

APPORTIONMENT.

The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate, partly freehold and partly copyhold, of the manor, and afterwards under an inclosure act, carried in two claims, one in respect of the devised, and the other in respect of the purchased estate, and obtained two allotments accordingly. He afterwards died, and the executory devise took effect: held that the copyhold part of the purchased estate being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as

was proportionate to the value of the copyhold part; and it was referred to the Master to apportion the allotment accordingly. [*King v. Moody.*] - - - - - 579

ASSETS.

An executor or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts. [*Maltby v. Russell.*] - - - - - 227

ATTACHMENT.

A plea may be filed after the return of a simple attachment. [*Hamilton v. Hibbert.*] - - - - - 225

AUCTIONEER.

If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader if he insists upon retaining either his commission or the duty. [*Mitchell v. Hayne.*] - - - - - 63

AWARD.

1. The Court will enforce an award made under an order of reference by consent in a cause; and it makes no difference that it is a part of the order that the parties should execute arbitration bonds. It is not necessary to make such an award a

- rule of Court. [*Marquess of Ormond v. Kynnersley.*] - - - 15
2. An award made under an agreement entered into after a bill is filed to refer the whole subject-matter of the suit to an arbitrator, may be pleaded to the bill. But where all the parties to the suit were not parties to the award (although the plaintiff was a party to it), and where part of the prayer of the bill was for the execution of the trusts of a deed under which some of the parties to the suit were interested who were not parties to the award, a plea of the award was ordered to stand for an answer, with liberty to except. [*Dryden v. Robinson.*] - - 529

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REFEREE.

BANKRUPT.

1. Where a mortgagee becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the Court will not, on the application of the assignees alone, make an immediate decree under 7 Geo. 2. c. 20. [*Garth v. Thomas.*] - - - 188
2. To a bill by assignees of a bankrupt against a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting pursuant to the 5th Geo. 2. c. 30. s. 38. was allowed. [*Ocklestone v. Benson.*] - - - 265
3. The directors of a company assigned their salaries and shares to the company to secure debts due from them on their private accounts,

and empowered the company to direct the treasurer to retain their salaries and dividends, and sell their shares for payment of their debts; one of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name: held that they passed to his assignees as being in his order and disposition, but that the company had a right to set off against the bankrupt's debt, the dividends and salary due to him at his bankruptcy. [*Nelson v. The London Assurance Company.*] - - - 292

4. A lease was granted to *W.* who afterwards committed an act of bankruptcy and then executed a declaration of trust in favour of *R.*, on the trial of an issue directed by the Court, it was found that *W.*'s name was used in trust for *R.*: held that the lease did not pass to *W.*'s assignees. [*Gardner v. Rowe.*] 346
5. An order obtained by a defendant to a bill of discovery for payment of his costs is regular, although the plaintiff had previously become bankrupt. [*Hibberson v. Fielding.*] 371

See DISMISSAL OF BILL.

BIDDINGS.

A purchaser who has confirmed his report nisi, and then is served with a notice of motion to open the biddings cannot confirm his report absolutely. [*Vansittart v. Collier.*]

BOND.

A bond for securing a provision for a woman, who had been seduced by the obligor, and for her children, given after cohabitation determined is good, notwithstanding the obligor was married when the connexion commenced. [*Knye v. Moore.*]

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CERTIORARI.

Plaintiff had removed the proceedings in a replevin from a county court in Wales to the Court of Great Sessions, and then applied to this Court for a certiorari to remove them into the King's Bench, the Court granted the writ, without requiring the plaintiff to shew any special ground for it. [*Edwards v. Bowen.*] - - - 514

CHAMPERTY.

Where a creditor who had instituted proceedings at law and in equity against his debtor, enters into an agreement with the debtor to abandon those proceedings, and give up his securities in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor, and agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, and in recovering his securities: held that the agreement does not amount to champerty, but would have done so if it had

stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit. [*Hartley v. Russell.*]

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CHARITY.

1. The Court has no jurisdiction under the 52d Geo. 3. c. 101. to direct, upon petition, an account of the assets of a person who had received the rents of a charity estate. [In the matter of *St. Wenn's Charity.*] 66
2. Where a common was enclosed under an Act of Parliament passed with the consent of the proprietors, and was vested in commissioners upon trust to apply the rents for the improvement of a town, with power to them to levy a rate on the inhabitants in case the rents proved deficient, an information and bill being filed by some of the inhabitants on behalf of themselves and the others, against the commissioners, for an account of the rents, alleging misapplication, and that a rate levied was unnecessary: held, on general demurrer, first that the funds constitute a charity, and second that the object of the suit being to avoid the rate, the plaintiffs had a right to sue on behalf of themselves and the other inhabitants. [*The Attorney-General v. Heelis.*] - - - 67
3. Bequest to the widows and orphans of the parish of L.: held a good

charitable bequest. [*Attorney-General v. Comber.*] - - - - 93

4. Where a testator gives a sum of stock to trustees, and shows a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does in fact specify some of them, and the yearly sums to be paid to them, but leaves blanks for the names of others, and for the sums to be paid to them; the Court will refer it to the Master to approve of a scheme for the application of the remaining dividends. [*Pieschel v. Paris.*] - - - - 384

5. A corporation which was bound to pay, out of the revenues of charity lands, a certain annual sum to a college, in the 4th of James the First, conveyed to the college lands then of that annual value in satisfaction of the annual sum. The lands so conveyed, by accidental circumstances, became of much greater value in proportion than the lands which were reserved by the corporation for the other purposes of the charity; yet the Court will not at this day undo an arrangement which was fair at the time, and had the approbation of the executor of the founder. [*The Attorney-General v. Pembroke Hall.*] - - - - 441

6. A devise to the British Museum is within the statute of Mortmain; and so is every devise for a public purpose, whether local or general. [*Trustees of the British Museum v. White.*] - - - - 594

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COMMISSION.

1. It is not irregular for the defendant's solicitor to be one of the commissioners for taking the answer. [*Bird v. Brancker.*] - 186
2. Where a schedule written on paper was returned with a commission of partition, the plaintiff's Clerk in Court was allowed to engross it on parchment, and to file the engrossment with the return, in analogy to the practice where foreign depositions are returned on paper. [*Jones v. Totty.*] - - - - 219
3. A motion for a commission to examine a witness abroad, in aid of an action at law, must be supported by an affidavit, stating the name of the witness and the points to which he is to be examined. [*Mendizabel v. Machado.*] - - - - 483

See MULTIFARIOUSNESS.

COMPENSATION.

Surveyors appointed to make a partition between tenants in common having by mistake allotted to one of them a piece of land which belonged to him exclusively, and several of the allotments having been sold before the mistake was discovered, the Court decreed a pecuniary compensation to be made to him. [*Dacre v. Gorges.*] - 454

CONDITION.

1. Devise of an estate to trustees upon trust to pay the rents and profits to

- the testator's son *I.* while unmarried, and to convey to him in case of his marriage with the consent of the trustees; but in case he should marry against their consent, then to sell the estate and divide the proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage when they were informed of it: held, that the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect. [*Long v. Ricketts.*] - - - - - 179
2. Bequest to *M.* on the day of her marriage with any other person than *I.* and if she married *I.* then over. *M.* married *I.* in the lifetime, and with the consent of the testator: held that she was entitled to her legacy. [*Smith v. Cowdery.*] 358

CONDUCT OF CAUSE.

See SOLICITOR, 2.

CONSTRUCTION.

1. By the settlement on the marriage of *J. H.* with *C. R.* portions were to be raised for the younger children of *J. H.* by *C. R.* or any future wife, but not to be paid until after the decease of *J. H.*, *C. R.*, or such future wife, though no estate was given to such future wife; and power was given to *J. H.* to appoint the interest of the portions to be raised for the children's maintenance, and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter day after the decease of the survivor of *J. H.*, *C. R.*, or such future wife. *J. H.* died, leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: held that the trustees had no power to allow maintenance during the second wife's lifetime, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. [*Hume v. Rundell.*] 174
2. Devise of freeholds and leaseholds to *A.* for life, and after his decease to the heirs of his body, their heirs executors, &c. gives *A.* an estate tail in the former, and the absolute interest in the latter. [*Kinch v. Ward.*] - - - - - 409
3. Legacy to *A.* as soon as she attains twenty-one, with interest, is contingent, and no interest is payable until the legatee attains twenty-one, and then is to be computed from the end of a year after the testator's death. [*Knight v. Knight.*] - 490
4. Residuary devise of real and personal estate to all the issue, child or children, of *M. F.* as should be alive at the time of the decease of the survivor of two successive tenants for life, equally, amongst them; if more than one, to be divided share and share alike, when and as they

should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators, and assigns, for ever as tenants in common: held, that the children living at the death of the tenants for life, took absolute vested interests in the personal as well as the real estate. [*Farmer v. Francis.*]

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5. Testatrix directed her legacies to be paid by her executor, to whom she afterwards gave all her real estates, and the residue of her personal estates, after payment of her debts and funeral expences: held that the legacies were not charged on the real estates. [*Parker v. Fearnley.*]

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See COPYHOLDS, 1, 2.—CONVERSION, 1. DEVISE, 8. LEASEHOLDS. LEGACY, 3. 5. 6. 7. 9. 10. MONTH. SETTLEMENT.

CONTEMPT.

Giving a notice of trial is a breach of an injunction to stay trial. [*Bird v. Brancker.*] - - - 186

CONVERSION.

1. Testatrix devised all her messuages, lands, tenements, hereditaments and real estate to trustees in trust to sell, and out of the produce to pay her funeral and testamentary expences and legacies, except her charitable legacies which she directed to be paid out of her personal estate legally applicable to that purpose, and

not out of any part of her said messuages, lands, &c. which she might die seised or possessed of, and she also directed her trustees to keep separate accounts of the proceeds of her messuages, &c. and of her personal estate legally applicable to charitable purposes, and that if the proceeds of her messuages, &c. should be insufficient to pay the legacies directed to be paid therewith, the trustees should apply her personal estate in payment of such legacies: held, 1st. that notwithstanding the personal estate was more than sufficient to pay the charitable legacies, no part of it could be applied to pay the other legacies until the proceeds of the real estate were exhausted; 2d. that the testatrix's leaseholds passed to the trustees under the devise of all her messuages, &c.; 3d. that her heir and next of kin, and not her residuary legatee were entitled to the surplus proceeds of her freeholds and leaseholds; and 4th, that the freeholds having been properly sold in the heir's life-time, the surplus was part of his personal estate. [*Dixon v. Dawson. Slavin v. Furside.*] 327

2. Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor his executors and administrators, if a sale takes place in the life-time of the mortgagor, the surplus is personal estate, but if after his death, it is real estate. [*Wright v. Ross.*] - - - 323

COPYHOLDS.

1. Testator having surrendered some of his copyholds to the use of his will, and left others unsurrendered, devised all his copyhold messuages, lands, &c. whatsoever, and where-soever, and which he had surrendered to the use of his will: held that the unsurrendered as well as the surrendered estates passed by the will. [*Strutt v. Finch.*] - - 229
2. Devise of "all my freehold and copyhold messuages, &c. the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered, as well as surrendered copyholds. [*Oxenforth v. Cawkwell.*] - - 558
3. The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate partly freehold and partly copyhold of the manor, and afterwards under an inclosure act carried in two claims, one in respect of the devised, and the other in respect of the purchased estate, and obtained two allotments accordingly; he afterwards died, and the executory devise took effect: held that the copyhold part of the purchased estate being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part; and it was referred to the Master to apportion

the allotment accordingly. [*King v. Moody* - - - - - 579

COPYRIGHT.

Copyright may be either in respect of the matter or the arrangement; but no property can be acquired in an article copied from a prior work. [*Barfield v. Nicholson.*] - - 1

See INJUNCTION, 8.

COSTS.

1. A bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff without any communication with the plaintiff himself, being dismissed with costs; the solicitor ordered to pay the costs, it appearing that the plaintiff had absconded before the bill was filed. [*Hall v. Bennett.*] - - 78
2. Where a decree orders the defendant to retain his costs when taxed out of the balance in his hands, and pay the residue into Court; if the defendant delay to get the costs taxed, the plaintiff must move that he may bring in his bill of costs to be taxed within a limited time, and not that he may pay in the whole balance. [*Newsome v. Shearman.*] 95
3. Plaintiff, by his original bill, sought to set aside a deed: after the answer was filed, he, under the usual order, amended the bill, by making quite a different case, and sought to establish the deed. The Court ordered

him to pay the costs of the original bill, and of certain accounts set forth in the answer in compliance with the prayer of that bill, and the costs of the motion. [*Mavor v. Dry.*]

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4. If the Master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. [*Reynolds v. Blake.*] - - - - - 117

5. Where a legacy is charged upon land, and the price of the land is insufficient to pay the legacy, a mortgagee of the devisee of the land shall not be allowed his costs in a suit against him, and the devisee for payment of the legacy. [*Shackleton v. Shackleton.*] - - - - 242

6. A purchaser under a decree is entitled to his costs where the Master reports against the title, although there is no fund in Court. [*Smith v. Nelson.*] - - - - - 557

7. An order obtained by a defendant to a bill of discovery for payment of his costs is regular, although the plaintiff had previously become bankrupt. [*Hibberson v. Fielding.*]

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8. Creditor proceeding at law against the executor after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his proceedings. [*Anonymous.*] - 424

9. If a bill of costs is taxed after the solicitor's death, his representative w^{ill}. not be ordered to pay the costs

of taxation, although more than a sixth is deducted. [*In re Cole.*]

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COVENANT.

The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: held that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. [*Marsh v. Wells.*] - - - - - 87

CREDITOR'S SUIT.

Where a plaintiff files a bill on behalf of himself and all other persons of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the suit at his pleasure; but after the decree he cannot deprive the other persons of the same class of the benefit of the decree, if they think fit to prosecute it. [*Handford v. Storie.*] - - - - - 196

See DEBTOR AND CREDITOR, 1, 5.

CROSS-BILL.

See DEEDS, 1.

DEBTOR AND CREDITOR.

1. A bill to carry the trusts of a creditor's deed into execution may be

- filed on behalf of all the creditors by one of them only where they all executed the deed, but were very numerous. [*Weld v. Bonham.*] 91
2. A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it, and afterwards persuaded his son to continue the trade against his inclination, whereby the son suffered great losses. The father on his death-bed caused the promissory note to be burned and died intestate: held that the burning of the note amounted in equity to a release of the debt, and that the sum which remained due upon it was an advancement to the son. [*Gilbert v. Wetheroll.*] - - - - 254
 3. Creditor proceeding at law against the executor, after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his proceedings. [*Anonymous.*] 424
 4. If by the neglect of the creditor the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged. [*Capel v. Butler.*] 457
 5. A creditor who had filed a bill on behalf of himself, and all other creditors, against trustees to whom estates had been conveyed for payment of the debts, having, in consideration of payment of his debt by an agent of the debtor, dismissed the bill before any decree, although he was paid out of the trust fund; a bill filed by another creditor, on behalf of himself and all other creditors, against the plaintiff in the first suit, and the trustees for recovery of the sum paid to him, was dismissed with costs, it appearing that the trustees gave no authority for the payment out of the trust fund, and that he did not know that he had been paid out of that fund. [*Handford v. Storie.*] - - 196
 6. A debtor to a testator cannot maintain a bill against the personal representative, to obtain the directions of the Court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative, to recover the debt, on the ground that the debt had been appropriated by the testator for a particular purpose, and that the personal representative intended to apply it for purposes not warranted by the will. [*Darthez v. Winter.*] - - - - - 536
 7. An annuity of 200*l.* was bequeathed to A. provided he paid 2,000*l.* due to the testator; but if he paid 1,000*l.*, then an annuity of 100*l.* with a recommendation to the executor to lean on the side of mercy, and to be liberal to him. A. paid off 1,400*l.*, the executor (who was also residuary legatee) paid the annuity of 200*l.* during his life, and waved in writing, but did not formally release, the remainder of the debt; his executor may withhold the annuity until the remainder of the debt is paid. *Semble.* [*Hemmings v. Gurrey.*] - - - - - 311

See SATISFACTION, 2.

DECREE.

1. Where a plaintiff files a bill on behalf of himself and all other persons of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure; but after the decree he cannot deprive the other persons of the same class of the benefit of the decree, if they think fit to prosecute it. [*Handford v. Storie*] - - - - - 196
2. Where, by mistake, sums paid into court under the decree were included in the balances reported due from the defendant, and the decree on further directions ordered those balances to be paid into court: held that the mistake could not be rectified without rehearing the cause on the latter decree. [*Brookfield v. Bradley*.] - - - - - 64

See APPEARANCE.

DEEDS.

1. Production of an instrument in the plaintiff's possession ordered upon motion, supported by affidavit, that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it. [*Jones v. Lewis*.] 242
2. If a bill is filed to set aside a conveyance, on the ground of fraud, the Court will not, on motion, order

a production of the conveyance. [*Tyler v. Drayton*.] - - - 309

DEFENDANT.

Ordered, that a defendant a female infant not baptized, should be described in the subpoena as the youngest female child of the father and mother. [*Eley v. Broughton*.] - - - 188
See ANSWER, 4. APPEARANCE.

WITNESS.

DEMURRER.

A defendant against whom an attachment had issued for want of an answer, tendered the costs of the contempt, and then filed a demurrer. The demurrer was ordered to be taken off the file. [*Mellor v. Hall*.] 321

See MULTIFARIOUSNESS.

PARTIES, 3.

DEPOSITIONS.

The Court will not, on motion, order depositions in a title cause in the Exchequer, to be read in a title suit in this Court, against other occupiers of land in the same parish, though the objects of both suits and the interest of the parties were the same. [*Goodenough v. Attony*.] 481

DEVISE.

1. Devise of an estate to trustees upon trust to pay the rents and profits to the testator's son I., while unmarried, and to convey to him in case of his marriage, with the consent of

- the trustees, but in case he should marry against their consent, then to sell the estate, and divide the proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage when they were informed of it: held that the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect. [*Long v. Ricketts.*] - - - 179
2. Where real estate is devised, subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence, that the mortgage or purchase money was not to be applied for the debts or legacies. [*Watkins v. Cheek.*] 199
3. Testator having surrendered some of his copyholds to the use of his will, and left others unsurrendered, devised all his copyhold messuages, lands, &c., whatsoever and where-soever, and which he had surrendered to the use of his will: held that the unsurrendered as well as the surrendered estates passed by the will. [*Strutt v. Finch.*] - 229
4. Testator directed his real and personal property to be sold and divided amongst his sisters, a power to the executors to sell the real property was implied. [*Tylden v. Hyde.*] - - - - - 238
5. Testator directed his residuary estate to be laid out in the purchase of land as soon as a convenient purchase could be found in the county of York, which upon a fair letting would produce a yearly rent equal to three and a half per cent. upon the amount of purchase-money, and in the mean time the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate, from the end of one year after the testator's death until it is laid out as directed. [*Kilvington v. Gray.*] - - - - - 396
6. Devise of freeholds and leaseholds to A. for life, and after his decease to the heirs of his body, their heirs, executors, &c., gives A. an estate tail in the former, and the absolute interest in the latter. [*Kinch v. Ward.*] - - - - - 409
7. Devise of copyhold land in fee upon condition that the devisee within one month pay 2,000 *l.* to the executor, to be applied for charitable purposes, the testator having left no customary heir, and no next of kin. Held that the devisee took the land subject to the payment of the 2,000 *l.*, and that the Crown (and not the Lord of the Manor), was entitled to the 2,000 *l.* by prerogative if personal estate, because there was no next of kin; and if real estate, because there was no customary heir. [*Henchman v. The Attorney General.*] - - - 498

8. Testator devised his estates at *S.* and *H.* to trustees, in trust, if there should be only one son of *D.* who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards drew his pen through the trust to sell, and, by a codicil, declared that he intended to erase the direction to sell only; he then gave all his estates to the son of *D.* who should first attain twenty-one, and change his name to *E.* *D.* at the death of the testator had a son who was still an infant, and afterwards had another son: held, that the codicil revoked the devise of the *S.* and *H.* estates, and also the devise of the residue of the estates to the trustees; and that *D.*'s eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seised at the date of his will, and those he purchased afterwards, and consequently was entitled to the rents during his infancy. [*Duffield v. Elwes.*] - - - - - 544
9. Devise of "all my freehold and copyhold messuages, &c. the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsundered as well as surrendered copyholds. [*Oxenforth v. Cawkwell.*] - - - 558

See CONSTRUCTION. 4, 5.

LEASEHOLDS.

DISCOVERY BILL OF.

An order obtained by a defendant to a bill of discovery for payment of his costs is regular, although the plaintiff had previously become bankrupt. [*Hibberson v. Fielding.*] 371

DISMISSAL OF BILL.

The time for dismissing the bill for want of prosecution being arrived, and the plaintiff having become bankrupt, ordered that the bill be dismissed without costs, unless the assignee file a supplemental bill within three weeks. [*Sharp v. Hullett.*] - - - - - 496

See DECREE, 1. PRACTICE, 18. 20. 30.

ELECTION.

1. By the settlement on the marriage of *J. H.* with *C. R.* portions were to be raised for the younger children of *J. H.* by *C. R.* or any future wife, but not to be paid until after the decease of *J. H.*, *C. R.*, or such future wife, though no estate was given to such future wife, and power was given to *J. H.* to appoint the interest of the portions to be raised for the children's maintenance, and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter-day after the decease of the survivor of *J. H.*, *C. R.*, or such future wife, *J. H.* died leaving his second wife surviving, and by his will, which

was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: held that the trustees had no power to allow maintenance during the second wife's life-time, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. [*Hume v. Rundell.*]

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2. Where it was not apparent on the face of the will, that a general devise in trust to sell was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of that estate is not put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate. [*Blommart v. Player.*] - - - - - 597

See EQUITY. DEBTOR AND CREDITOR, 6.—SPECIFIC PERFORMANCE, 5.

EQUITY OF REDEMPTION.

Trustee in receipt of the rents and profits of a mortgaged estate, under an old conveyance of the equity of redemption, upon trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage. [*James v. Biou. Owen v. Flask.*] - 600

See HUSBAND AND WIFE, 1.
MORTGAGE, 8.

ESCHEAT.

Devise of copyhold land in fee upon condition that the devisee within one month pay 2,000 *l.* to the executor, to be applied for charitable purposes, the testator having left no customary heir, and no next of kin: held that the devisee took the land, subject to the payment of 2,000 *l.*, and that the Crown and not the lord of the manor was entitled to the 2,000 *l.* by prerogative; if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. [*Henchman v. The Attorney-General.*] - - - - - 498

ESTOPPEL.

A conveyance by lease and release will operate as an estoppel, and where the releasor can have the benefit of the conveyance at law, this Court will not interfere in his behalf. [*Bensley v. Burdon.*]

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EVIDENCE.

1. The custody from which a document offered in evidence is taken, cannot be proved by an interested person.

The plaintiff represented himself in his bill as entitled to the tithes of the parish of B. without noticing a district called H., which was part of the parish, but had of late years

been considered as a distinct parish. At the trial of issues as to certain moduses in B., the plaintiff proved that H. was part of B., and that the moduses did not prevail in H.; the verdict was however in favour of the moduses. A motion by the plaintiff for a new trial was refused, because the evidence as to H. was a surprise upon the defendant, and was calculated to defeat the intention of the Court in directing the issues. [*Car-
rington v. Jones.*] - - - 135

2. It is not necessary for a plaintiff who claims an estate as tenant in tail under the marriage settlement of his father and mother, to prove their marriage by affidavit before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover the estate. [*Hodgson v. Dean.*] 221
3. Payment of money, though evidence against the payer of the title of the party receiving it, is not evidence against the receiver that the payer was the party bound to pay it. [*James v. Biou. Owen v. Flack.*] - - - 600
4. The suppression of some of a series of documents relating to the title, which are admitted to be in the possession of a party, is evidence that the documents withheld afford inferences unfavourable to the title of the party who withholds them. [*Ibid.*]

EXCEPTIONS.

- Where a plaintiff takes no exception to the answer to the original bill, he cannot take an exception to the answer to the amended bill, upon a principle which would have applied equally to the answer to the original bill. [*Ovey v. Leighton.*] - 234
2. Exceptions to an answer containing in substance, but not *verbatim*, interrogatories not answered, will be overruled; but if the defendant has submitted to answer, and his further answer is referred back, he is too late to object to the form of the exceptions. [*Hodgson v. Butterfield.*] 236
 3. Where exceptions will lie to a master's report, it must be regularly confirmed before any order can be made upon it. [*Scott v. Livesey.*] 300
 4. It is irregular to obtain one order of reference only, where more than one answer is excepted to. [*Allanson v. Moorsom.*] - - - 478
 5. Exceptions cannot be taken to a Master's report approving of new trustees, nor will the Court interfere with the report of the Master where there is no complaint that the persons approved of by him are unfit. [*The Attorney General v. Dyson.*] 528

EXECUTOR.

1. An executor or administrator may, after a suit is instituted against him

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for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts. [*Maltby v. Russell.*]

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2. Testator gave annuities to his trustees for their trouble in the execution of his will, and died possessed of several houses let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not therefore lose their annuities. [*Wilkinson v. Wilkinson.*]

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3. Testator directed his real and personal property to be sold and divided amongst his sisters: a power to the executors to sell the real property was implied. [*Tylden v. Hyde.*]

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4. A debtor to a testator cannot maintain a bill against the personal representative, to obtain the directions of the Court as to the disposal of the money due by him, and to restrain an action brought by the personal representative to recover the debt, on the ground that the debt had been appropriated by the testator for a particular purpose, and that the personal representative intended to apply it for purposes not warranted by the will. [*Darthez v. Winter.*]

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5. An executor admitting himself to be a debtor to the testator will be ordered on motion to pay the debt into Court. [*Rothwell v. Rothwell.*]

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EXECUTORY DEVISE.

If a tenant of an estate subject to an executory devise pays off a charge upon the estate, and the executory devise afterwards takes effect, his executors will be entitled to be repaid the amount of the charge. [*Drinkwater v. Combe.*]

- - 340

FORECLOSURE.

Where a mortgagee becomes a bankrupt and a bill of foreclosure is filed against him and his assignees, the Court will not, on the application of the assignees alone, make an immediate decree under 7 Geo. 2, c. 20. [*Garth v. Thomas.*]

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HEIR.

Devise of copyhold land in fee upon condition that the devisee within one month pay 2000 *l.* to the executor, to be applied for charitable purposes, the testator having no customary heir and no next of kin: held that the devisee took the land subject to the payment of the 2000 *l.* and that the Crown (and not the Lord of the Manor), was entitled to the 2000 *l.* by prerogative if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. [*Henchman v. The Attorney General.*]

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See CONVERSION, 1, 2.

HUSBAND AND WIFE.

1. Husband and wife mortgaged the wife's freeholds for 1000 years, reserving the power to redeem to them, or either of them, and levied a fine to the mortgagee for the term, and subject thereto to the husband in fee; they also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs; the husband afterwards released his equity of redemption as to both estates to the mortgagee in fee; the mortgagee entered into possession, and the husband afterwards died: held that the wife is entitled to redeem the copyholds, but not the freeholds. [*Reeve v. Hicks.*] - - - - - 403
2. A lady entitled to a fund in court married the day after she came of age. After the marriage, a settlement of her property was made on her and her husband for their lives, and on the children of the marriage, absolutely: but the wife never consented in Court to a transfer of the fund to the trustees. After the husband's death and the birth of a child, the settlement was, at the suit of the wife, declared void, because it contained no provision for a second marriage, and because the rights acquired by the husband were, on account of the precipitation of the marriage, a surprise on the wife. [*Long v. Long.*] - - - - - 119
3. A suit by husband and wife against

the trustees of the latter's separate property cannot be pleaded in bar to a subsequent suit, by her and her next friend, against her trustees and husband, although the relief prayed in both suits is the same. [*Reeve v. Dalby.*] - - - - - 464

4. This Court will decree specific performance of an agreement of separation between husband and wife, although the agreement was made on a compromise of indictments preferred by the wife against the husband and others for an assault on her. [*Elworthy v. Bird.*] 372

INCUMBRANCE.

See EXECUTORY DEVISE. TENANT
IN TAIL, 2.

INFANT.

1. A lady entitled to a fund in court married the day after she came of age. After the marriage a settlement of her property was made on her and her husband for their lives, and on the children of the marriage, absolutely: but the wife never consented in court to a transfer of the fund to the trustees. After the husband's death and the birth of a child the settlement was, at the suit of the wife, declared void, because it contained no provision for the second marriage, and because the rights acquired by the husband were, on account of the precipitation of the marriage, a surprise on the wife. [*Long v. Long.*] - - - - - 119
2. Where there are several funds pro-

vided by different persons for the maintenance of infants, the interest of the infants must alone determine which of the funds is first applicable. [*Foljambe v. Willoughby.*]

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See WARD OF COURT.

IMPERTINENCE.

1. The bill alleged that a bill of exchange held by the defendant was an accommodation bill, and required him to set forth the particulars of the consideration pretended to be given for it. The answer denied the allegation, and stated that the bill of exchange was paid to the defendant in the regular course of his business as a banker, and that the consideration did not consist of any specific sum, but of cash from time to time drawn out by the payer: held that this was a sufficient answer, and that it would have been impertinent in the defendant to set forth the general banking account. [*Webster v. Threlfall.*] - - 190
2. Prolixity in setting forth important documents is not impertinence: therefore, where the defendant set forth, verbatim, in his answer, a state of facts and all the affidavits, to show that the demand made in this suit had been disallowed by the Master in a former suit, the Court held that the answer was not impertinent. [*Lowe v. Williams.*] 574
3. An order for referring a defendant's examination for impertinence cannot be obtained as of course, if the

plaintiff has proceeded on the examination. [*Johnstone v. Ure.*] 578

INJUNCTION.

1. Giving a notice of trial is breach of an injunction to stay trial. [*Bird v. Brancker.*] - - - - 186
2. It is not necessary for a plaintiff who claims an estate as tenant in tail under the marriage settlement of his father and mother, to prove their marriage by affidavit before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover the estate. [*Hodgson v. Dean.*] 221
3. An order for an injunction for want of an answer, obtained after the Master has signed his report of the insufficiency of the answer, but before the report is filed, is irregular. [*Wynne v. Jackson.*] - - - 226
4. Special injunction granted to stay proceedings in an action in the court of Common Pleas at Lancaster. [*Hine v. Fiddes.*] - - - - 370
5. Although an injunction is not applied for upon an original bill, yet if the bill is afterwards amended, an injunction will be granted, as of course, upon the defendant taking an order for time to answer the amended bill. [*Statham v. Hughes.*] 382
6. The common injunction had issued against all the defendants. One of them filed his answer, and then ob-

- tained the order nisi to dissolve the injunction, suggesting that all the defendants had answered: the order was discharged for irregularity. [*Todd v. Dismor.*] - - - 477
7. The plaintiff obtained the common injunction after four proclamations had been made under an exigent issued in an action commenced against him by the defendant: held that it was a breach of the injunction for the defendant to sue out a writ to compel the sheriff to make the fifth proclamation. [*Marsack v. Bailey.*] - - - - - 577
8. An author having sold the copy-right of a work published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it; *semble* that another publisher, who had no notice of this covenant, will be restrained from publishing a work subsequently purchased from the same author, and published under his name, on the same subject, and though there be no piracy of the first work. [*Barfield v. Nicholson.*] - - - - - 1

INTEREST.

Where the purchaser upon entering into possession paid the amount of of his purchase-money to his banker, and gave notice that he was ready to invest it, in such manner as the vendor should require, but no answer was returned to that notice, and the purchaser, during the inves-

tigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase-money, except for four days, when it was a little less; the Court held the purchaser not liable for interest, on the difference between his average balance during the period in question, and during the three preceding years. [*Winter v. Blades.*]

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See DEVISE, 5. LEGACY, 9.

INTERPLEADER.

If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty. [*Mitchell v. Hayne.*] - - - - - 63

ISSUE.

The plaintiff represented himself in his bill as entitled to the tithes of the parish of B., without noticing a district called H., which was part of the parish, but had of late years been considered as a distinct parish. At the trial of issues as to certain moduses in B., the plaintiff proved that H. was part of B., and that the moduses did not prevail in H.; the verdict was however in favour of the moduses. A motion by the plaintiff for a new trial was refused, because the evidence as to H. was a surprise upon the defendant, and was calculated to defeat the inten-

tion of the Court in directing the issues. [*Carrington v. Jones*.] 135

JOINT-STOCK COMPANY.

See ANSWER, 6.

JURISDICTION.

1. No appeals to the Court of Chancery from decisions, either of the Privy Council, or the Commissioners under the acts and conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government. [*Hill v. Reardon*.] - 431
2. Funds given by the Crown, the legislature, or individuals, for any public or general purpose, are to be administered by Courts of Equity, as charitable funds, but not where they are derived wholly from rates or assessments under an Act of Parliament. [*Attorney-General v. Heelis*.] - - - - - 77. 78

See CHARITY, 1. WARD OF COURT.

LACHES.

See HABENT AND CHILD.

LEASE.

A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of R.; on the trial of an issue directed by the Court, it was found that W.'s name was used in trust for R.: held that the lease did not pass to W.'s assignees. [*Gardner v. Rowe*.] - 346

See TENANT FOR LIFE, 1.

LEASE AND RELEASE.

A conveyance by lease and release will operate as an estoppel, and where the releasee can have the benefit of the conveyance at law, by way of estoppel, this Court will not interfere in his behalf. [*Bensley v. Burdon*.] - - - - - 519

LEASEHOLDS.

Testatrix devised all her messuages, lands, tenements, hereditaments, and real estate to trustees in trust to sell: held that leaseholds passed to the trustees under the devise of all her messuages, &c. [*Dixon v. Dawson, Slavin v. Farside*.] 327

See CONSTRUCTION, 2.

LEGACY.

1. Legacies given to the same persons though by different instruments, and in some instances of different amounts: held to be substitutional. [*Gillespie v. Alexander*.] - 145
2. Legacy charged upon the real estate to vest immediately on the testator's death, but to be paid to the legatee on attaining 21, and the interest to be applied in the mean time for maintenance: the legatee having died before attaining 21, held that the express direction that the legacy should vest on the death of the testator prevents its sinking for the benefit of the devisee, and that the personal representative of the legatee was entitled to the legacy. [*Watkins v. Cheek*.] 199

3. Residuary bequest to two grand-daughters of testatrix "in trust, till they come of age or marry, the interest to be received in the mean time and paid to them, but if one of them die before marriage or of age, then to the survivor, her child, or children, but should they both die leaving no issue, then I give them power to leave it by will as they shall think fit." One of the legatees married and the other attained 21: held that they both acquired absolute vested interests. [*Thackeray v. Hampson.*] - - - - 214
4. A pecuniary legacy directed to be paid by the sale of an estate which the testator had contracted to purchase, is payable out of the testator's general assets, if the contract cannot be completed. [*Fowler v. Willoughby.*] - - - - 354
5. Bequest to M. on the day of her marriage with any other person than T., and if she married T., then over. M. married T. in the lifetime, and with the consent of the testator: held that she was entitled to her legacy. [*Smith v. Cowdery.*] - - - - 358
6. Legacy of 600 l. to F., and at her death to her two daughters in equal shares, and at their death to their children; one of the daughters having died without children: held that the children of the other daughter did not take the whole 600 l. but only their mother's share. [*Taniere v. Pearkes.*] - - - - 383
7. Bequest to testatrix's daughter for life, and after her death as she should appoint, and in default of appointment to the testatrix's next of kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died without having had any child, and without executing any appointment: held that the persons who would be next of kin at the testatrix's death, if her daughter had been then dead without children, were entitled. [*Bird v. Wood.*] - - - - 400
8. Where legacies were charged upon the real estates of a trader, and his devisee and executor sold part of the real estates before the debts were paid: held that the purchaser notwithstanding 47 Geo. 3. c. 74, was liable to see his purchase-money applied in payment of the legacies. [*Horn v. Horn.*] - - - - 448
9. Legacy to A. as soon as she attains 21 with interest is contingent, and no interest is payable until the legatee attains 21, and then is to be computed from the end of a year after the testator's death. [*Knight v. Knight.*] - - - - 490
10. Bequest of money to trustees upon trust to invest it in the public funds and pay the dividends to A. until her marriage, and upon her marriage to transfer the stock to her, but in case she should die unmarried, then to transfer the stock to such person as she should by her will appoint, and, in default of such appointment,

to her executors, or administrators. Semble that she is not entitled to have the fund transferred to her while she remains unmarried. [*Wilson v. Mount.*] - - - 493

See CONDITION, 1. CONSTRUCTION, 5.

LEGACY DUTY.

1. A testator resident in India, and having all his property there, bequeathed his residuary estate to H. L., but if she should die before him then to her children. H. L. died before the testator and the executor, who was also resident in India, proved the will there and remitted the residue to his agent in England, with directions to pay it to H. L. or her children. A suit having been instituted by the children, who were infants, against the executor and his agents to have the residue secured: held that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit. [*Logan v. Fairlie.*] - - - 284
2. Where a testator dies in India, having personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England. [*Ibid.*]

MAINTENANCE.

1. Where there are several funds provided by different persons for the maintenance of infants, the interest

of the infants must alone determine which of the funds is first applicable. [*Foljambe v. Willoughby.*]

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2. By the settlement on the marriage of J. H. with C. R. portions were to be raised for the younger children of J. H. by C. R., or any future wife, but not to be paid until after the decease of J. H., C. R. or such future wife, though no estate was given to such future wife, and power was given to J. H. to appoint the interest of the portions to be raised for the children's maintenance, and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter day after the decease of the survivor of J. H., C. R. or such future wife. J. H. died leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: held that the trustees had no power to allow maintenance during the second wife's lifetime, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. [*Hume v. Rundell.*] - - - 174

MISDEMEANOR.

It is not illegal to compromise indictments for a misdemeanor, *secus* as

to indictments for felony. [*Elworthy v. Bird.*] - - - - 372

MISTAKE.

1. Surveyors appointed to make a partition between tenants in common having by mistake allotted to one of them a piece of land which belonged to him exclusively, and several of the allotments having been sold before the mistake was discovered, the Court decreed a pecuniary compensation to be made to him. [*Dacre v. Gorges.*] - - - - 454
2. The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate, partly freehold and partly copyhold of the manor, and afterwards, under an enclosure Act, carried in two claims, one in respect of the devised, and the other in respect of the purchased estate, and obtained two allotments accordingly; he afterwards died, and the executory devise took effect: held that the copyhold part of the purchased estate being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part; and it was referred to the Master to apportion the allotment accordingly. [*King v. Moody.*] - - - - 579

MODUS.

See **ISSUE.**

MONEY, PAYMENT OF, INTO COURT.

1. A defendant who had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, ordered upon motion in a suit for the performance of the trusts of the settlement to pay the money into court. [*Rothwell v. Rothwell.*] - - - - 217
2. Where the answer contains a clear admission that there is trust monies in the hands of a defendant, the Court will always, on an interlocutory application, order it to be paid into court. [*Ibid.*]

See **EXECUTOR, 5.**

MONTH.

Where an order allowed the plaintiff a month's time to amend his bill: held that a lunar month was meant. [*Cresswell v. Harris.*] - - 476

MORTGAGE.

1. A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the possession of the owner and his ancestors. [*Cooke v. Soltau.*] - 154
2. Where a mortgagee becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the Court will not, on the applica-

- tion of the assignees alone, make an immediate decree under 7 Geo. 2, c. 20. [*Garth v. Thomas.*] - 188
3. Where a legacy is charged upon land and the price of the land is insufficient to pay the legacy, a mortgagee of the devisee of the land shall not be allowed his costs in a suit against him and the devisee for payment of the legacy. [*Shackleton v. Shackleton.*] - - - - 242
4. Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators; if a sale takes place in the lifetime of the mortgagor the surplus is personal estate, but if after his death, it is real estate. [*Wright v. Rose.*] - - - - 323
5. Tenant in tail in remainder (after estates to A. for life, and to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate and dies without issue: the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to shew a contrary intention. [*Wiggell v. Wiggell.*] - - - - 364
6. Husband and wife mortgaged the wife's freeholds for 1,000 years, reserving the power to redeem to them or either of them, and levied a fine to the mortgagee, for the term; and subject thereto to the husband in fee, they also surren-

dered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs; the husband afterwards released his equity of redemption as to both estates to the mortgagee in fee, the mortgagee entered into possession, and the husband afterwards died: held that the wife is entitled to redeem the copyholds, but not the freeholds. [*Reeve v. Hicks.*] - - - - - 403

MORTMAIN.

A devise to the British Museum is within the statute of mortmain; and so is every devise for a public purpose, whether local or general. [*Trustees of British Museum v. White.*] - - - - - 594

MULTIFARIOUSNESS.

Demurrer allowed to a bill for a discovery and commissions to examine witnesses in aid of the defence to two separate actions for two separate libels. [*Shackell v. Macaulay.*] - - - - - 79

NEW TRIAL.

See ISSUE.

NOTICE.

Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the

contents prior to that date. [*Hodgson v. Dean.*] - - - - - 221

ORDER.

Where an order allowed the plaintiff a month's time to amend his bill: held that lunar month was meant. [*Cresswell v. Harris.*] - - 476

PARENT AND CHILD.

A tenant for life of real estate, with remainder to his children as he should appoint, remainder to them in fee, entered into an agreement with a creditor, to which his children were parties, that the estate should be immediately sold, and one half of the produce paid to the father, and the other to the children; the father remained in possession for seven years, and then died without having taken any step to carry the agreement into effect: a bill by the personal representative of the creditor against the children and the representative of the father, to have the agreement carried into effect, was dismissed, on the ground that the father, by continuing in possession of the estate, deprived his daughters of the benefit of the agreement. [*Rhodes v. Cook.*] 488

See PORTIONS.

PARTIES.

1. Bill by three of the partners in a numerous trading company, claiming certain privileges under the articles of copartnership, against the mem-

bers of the committee for managing the commercial concerns of the company, dismissed, because it was not filed by the plaintiffs on behalf of themselves and the other partners not members of the committee. [*Baldwin v. Laurence.*] - - 18

2. A bill to carry the trusts of a creditor's deed into execution may be filed on behalf of all the creditors by one of them only, where they all executed the deed but were very numerous. [*Weld v. Banham.*] 91

3. Demurrer allowed to a bill for the specific performance of an agreement for a lease entered into by the trustees of a numerous company for the use of the company, because none of the members of the company were parties to the bill. [*Douglas v. Horsfall.*] - - 184

4. One of the shareholders of a canal is entitled to file a bill, on behalf of himself and the other shareholders to set aside an agreement made by the commissioners of the canal contrary to the provisions of the act under which the canal was made, because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the act complied with. [*Gray v. Chaplin.*] - - 267

5. A testator resident in India, and having all his property there, bequeathed his residuary estate to H. L., but if she should die before him then to her children. H. L. died before the testator, and the executor,

who was also resident in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to H. L., or her children. A suit having been instituted by the children who were infants, against the executor and his agent to have the residue secured: held that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit. [*Logan v. Fairlie.*] - - - 284

See CHARITY, 2.

PARTITION.

See COMPENSATION. COMMIS-
SION, 2.

PARTNERSHIP.

1. Bill by three of the partners in a numerous trading company claiming certain privileges under the articles of copartnership, against the members of the committee for managing the commercial concerns of the company, dismissed, because it was not filed by the plaintiffs on behalf of themselves and the other partners not members of the committee. [*Baldwin v. Lawrence.*] - - 18
2. Where a partner dies leaving the partnership accounts unsettled, the Ecclesiastical Court will grant administration of his effects to the surviving partners, or any persons claiming under them, if his next of kin decline it. [*Cawthorn v. Chalie.*]

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PENSION.

The purchaser of a pension granted by his late Majesty during pleasure, is not entitled to a pension granted by the present King to the same person, and of the same amount, under a new warrant reciting the grant made by his late Majesty, which had ceased, though the motive for granting both pensions was the same. [*Clay v. St. John.*] - 32

PETITION.

1. The Court has no jurisdiction under the 52d. Geo. 3. c. 101. to direct, upon petition, an account of the assets of a person who had received the rents of a charity estate. [*In the matter of St. Wenn's Charity.*] - - - - - 66
2. Where a bill is filed merely to obtain a transfer of stock standing in the name of a trustee, who is out of the jurisdiction of the Court, the order must be made at the hearing of the cause, and cannot be obtained by petition. [*Burr v. Mason.*]

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PLAINTIFF.

See DECREE, 1. WITNESS.

PLEA.

1. After plea allowed to part of the bill, the plaintiff cannot amend his bill without a special order, to be obtained on notice of motion stating

- the proposed amendments. [*Taylor v. Shaw.*] - - - - - 12
2. After plea of settled account allowed to part of the bill, motion to amend the bill by stating facts which tended to shew that there was no settled account, or that the plaintiff ought to be allowed to surcharge and falsify was refused with costs, because the plaintiff could prove that there was no settled account by taking issue on the plea, and might have amended with a view to surcharge and falsify before the plea was argued. [*Ibid.*]
 3. Plea by husband and wife, entitled as a joint and several plea: held, that the word "several" was mere surplusage, and did not vitiate the plea. [*Fitch v. Chapman.*] - 31
 4. A plea may be filed after the return of a simple attachment. [*Hamilton v. Hibbert.*] - - - - - 225
 5. To a bill by assignees of a bankrupt against a creditor, a plea that the suit was not instituted with the consent of the creditors, at a meeting pursuant to 5th Geo. 2. c. 30. s. 8. was allowed. [*Ocklestone v. Benson.*] 265.
 6. To a creditor's bill the defendant pleaded that the deceased was not indebted to the plaintiff at her death, and accompanied the plea by an answer, denying the existence of the debt, and the manner in which it was alleged to have been contracted: held that the answer overruled the plea. [*Thring v. Edgar.*] 274
 7. An answer to a negative plea must be confined to facts specially charged, as evidence of the plaintiff's title. [*Ibid.*]
 8. In a plea of purchase for valuable consideration, without notice, it is enough to deny notice generally in the plea; unless facts are specially charged in the bill, as evidence of notice. [*Pennington v. Beechey.*] 282
 9. A suit by husband and wife against the trustees of the latter's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend against her trustees and husband, although the relief prayed in both suits is the same. [*Reeve v. Dalby.*] - - - - - 464
 10. A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim, which the purchaser might have had notice of by using due diligence in investigating the title. [*Jackson and Wife v. Rowe.*] - - - 472
 11. Award made under an agreement, entered into after a bill is filed, to refer the whole subject matter of the suit to an arbitrator, may be pleaded to the bill. But where all the parties to the suit were not parties to the award (although the plaintiff was a party to it), and where a part of the prayer of the bill was for the execution of the trusts of a deed, under which some of the parties to the suit were interested who were not parties to the award, a plea of the award was ordered to stand for an

- answer, with liberty to except.
 [*Dryden v. Robinson.*] - - 529
12. One of the defendants to a bill by tenant in tail, for redemption of an estate, having put in a plea of a fine levied of part of the estate, averring, that the part included in the fine was the only part of the estate in which the defendant claimed any interest, and accompanied by an answer admitting the possession of title deeds, &c.: held, that the plea was overruled by the answer.
 [*Watkins v. Stone.*] - - - 560
See ANSWER, 4. PLEA, 5. 6. 9.

PLEADING.

1. Unless a defect in the memorial of an annuity is stated in the pleadings on evidence, no advantage can be taken of it. [*Dunn v. Calcraft.*] 56
2. Demurrer allowed to a bill for a discovery, and commissions to examine witnesses in aid of the defence to two separate actions, for two separate libels. [*Shackell v. Macaulay.*] 79
3. An answer as to matters to which the defendant was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a stranger to and could not form any belief respecting them, is sufficient. [*Amhurst v. King.*] 183
4. Demurrer allowed to a bill for the specific performance of an agreement for a lease entered into by the trustees of a numerous company, for the use of the company, because none of the members of the com-

- pany were parties to the bill.
 [*Douglas v. Horsfall.*] - - 134
5. It is not necessary to pray process against persons who are charged to be out of the jurisdiction of the Court.
 [*Haddock v. Thomlinson.*] - 219
6. To a bill by assignees of a bankrupt by a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting pursuant to the 5th Geo. 2, c. 30, s. 8, was allowed. [*Ocklestone v. Benson.*] - - - - - 265
7. One of the shareholders of a canal is entitled to file a bill on behalf of himself and the other shareholders, to set aside an agreement made by the commissioners of the canal contrary to provisions of the act under which the canal was made, because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the act complied with. [*Gray v. Chaplin.*] - 267

PORTIONS.

- A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it re-

spected her: held, that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund. [*Noel v. Lord Walsingham.*] - - - 99

POWER.

Where a power was to be executed by a will signed and published in the presence of and attested by three witnesses: held, that a will concluding with this declaration, "this is my last will and testament," and expressed to be signed by the testatrix in the presence of three attesting witnesses, was not a good appointment, because the publication was not attested. [*Stanhope v. Keir.*] - - - - - 37

See DEVISE, 4. WILL, 4. REMOTENESS.

PRACTICE.

1. Where a bill is filed merely to obtain a transfer of stock standing in the name of a trustee who is out of the jurisdiction of the Court, the order must be made at the hearing of the cause, and cannot be obtained by petition. [*Burr v. Mason.*] 11
2. After plea allowed to part of the bill, the plaintiff cannot amend his bill without a special order to be obtained on notice of motion, stating the proposed amendments. [*Taylor v. Shaw.*] - - - - 12
3. After plea of settled account allowed to part of the bill, a motion to amend the bill by stating facts which tend-

ed to shew that there was no settled account, or that the plaintiff ought to be allowed to surcharge and falsify, was refused with costs, because the plaintiff could prove that there was no settled account by taking issue on the plea, and might have amended with a view to surcharge and falsify before the plea was argued. [*Ibid.*]

4. Where by mistake sums paid into court under the decree were included in the balances reported due from the defendant, and the decree on further directions ordered those balances to be paid into court: held, that the mistake could not be rectified without rehearing the cause on the latter decree. [*Brookfield v. Bradley.*] - - - - - 64
5. Where a decree orders the defendant to retain his costs, when taxed, out of the balance in his hands and pay the residue into court, if the defendant delay to get the costs taxed, the plaintiff must move that he may bring in his bill of costs to be taxed within a limited time, and not that he may pay in the whole balance. [*Newcome v. Shearman.*] 95
6. A Master's report of a receiver's account, like his report upon taxation of costs, does not require confirmation, and cannot be excepted to; but the Court will enter into the consideration of objections to the general principle on which the Master has proceeded in taking a receiver's account, but not of ob-

- jections to particular items of it. [*Shewell v. Jones.*] - - - 170
7. It is not irregular for the defendant's solicitor to be one of the commissioners for taking the answer. [*Bird v. Brancker.*] - - - 186
8. A defendant who had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, ordered, upon motion in a suit for the performance of the trusts of the settlement, to pay the money into court. [*Rothwell v. Rothwell.*] - - - 217
9. Where the answer contains a clear admission that there is trust money in the hands of a defendant, the Court will always, on an interlocutory application, order it to be paid into Court. [*Ibid.*] . . .
10. Where a schedule written on paper was returned with a commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment, and to file the engrossment with the return, in analogy to the practice where foreign depositions are returned on paper. [*Jones v. Totty.*] - - - 219
11. If there is only one defendant the bill may be ordered to be taken *pro confesso* on motion. [*Lewis v. Marsh.*] - - - 220
12. Permission given to defendants after decree to examine a plaintiff as a witness, the Master having certified the necessity for so doing, and the plaintiff having no beneficial interest in the property in dispute. [*Hougham v. Sandys.*] 221
13. It is not necessary for a plaintiff who claims an estate as tenant in tail, under the marriage settlement of his father and mother to prove their marriage by affidavit, before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover an estate. [*Hodgson v. Dean.*] 221
14. A plea may be filed after the return of a simple attachment. [*Hamilton v. Hibbert.*] - - - 225
15. A defendant may file a further answer before the Master has signed his report, as to the insufficiency of the first answer. [*Wynne v. Jackson.*] 226
16. An order for an injunction for want of an answer obtained after the Master has signed his report of the insufficiency of the answer, but before the report is filed, is irregular. [*Ibid.*]
17. Production of an instrument in the plaintiff's possession ordered, upon motion supported by affidavit that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it. [*Jones v. Lewis.*] 242
18. Where exceptions will lie to a master's report, it must be regularly confirmed before any order can be made upon it. [*Scott v. Livesy.*] 300
19. If a bill is filed to set aside a conveyance on the ground of fraud, the Court will not on motion order a production of the conveyance. [*Tyler v. Drayton.*] - - - 309
20. A defendant, against whom an

- attachment had issued for want of an answer, tendered the costs of the contempt and then filed a demurrer: the demurrer was ordered to be taken off the file. [*Mellor v. Hall.*] 321
18. A second order to dismiss cannot be obtained on the day on which a former order to dismiss is discharged. [*For v. Morewood.*] 325
19. Special injunction granted to stay proceedings in an action in the court of Common Pleas at Lancaster. [*Hinc v. Fiddes.*] - 370
20. A bill of revivor having been filed, but no order to revive obtained, the Court ordered the plaintiff to revive within ten days, or both the original bill and bill of revivor to be dismissed. [*Bolton v. Bolton.*] - - - - - 371
21. An order obtained by a defendant to a bill of discovery for payment of his costs, is regular, although the plaintiff had previously become bankrupt. [*Hibberson v. Fielding.*] 371
22. Where a party is in custody of the warden of the Fleet under process from the Common Pleas, and is detained upon an attachment from this court, he must be brought up by *habeas corpus* to the bar of the court, and turned over to the warden of the Fleet, before a sequestration can issue. [*Const v. Barr.*] - - 452
23. The Court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England, but the receiver must give sureties resident in England. [*Cockburn v. Raphael.*] - - 453
24. The common injunction had issued against the defendants; one of them filed his answer, and then obtained the order nisi to dissolve the injunction, suggesting that all the defendants had answered. The order was discharged for irregularity. [*Todd v. Dismor*] - - - - 477
25. It is irregular to obtain one order of reference only where more than one answer is excepted to. [*Allanson v. Moorsom.*] - - . - - 478
26. If a person who is named as a defendant, but has never been served with a subpoena, or appeared to the bill, appears by counsel at the hearing, and consents to be bound by the decree, the defect is cured. [*Capel v. Butler.*] - - - - - 457
27. Where an order allowed the plaintiff a month's time to amend his bill: held that a lunar month was meant. [*Cresswell v. Harris.*] - - 476
28. A motion for a commission to examine a witness abroad, in aid of an action at law, must be supported by an affidavit stating the name of the witness and the points to which he is to be examined. [*Mendizabel v. Machado.*] - - - - - 483
29. The Court will not, on motion, order depositions in a tithe cause in the Exchequer to be read in a tithe suit in this court, against other occupiers of land in the same parish, though the objects of both suits and the interests of the parties were the same. [*Goodenough v. Atway.*] 481
30. The time for dismissing the bill for want of prosecution being ar-

- rived, and the plaintiff having become bankrupt, ordered that the bill be dismissed without costs, unless the assignee file a supplemental bill within three weeks. [*Sharp v. Hullett.*] - - - - - 496
31. Fourteen directors of a joint-stock company, against whom a bill was filed by a shareholder in the company for an account and dissolution of the concern, having filed fourteen separate answers, with long schedules to each, each of the answers and schedules being nearly verbatim the same, and the defendants appearing all by the same solicitor, who had threatened to ruin the plaintiff by the costs of the suit; the Court directed a reference to the Master, to ascertain whether it was necessary or expedient, with a view to the defence, that separate answers should have been filed. [*Vansandau v. Moore.*] - - - - - 509
32. Exceptions cannot be taken to a Master's report approving of new trustees, nor will the Court interfere with the report of the Master, where there is no complaint that the persons approved of by him are unfit. [*The Attorney General v. Dyson.*] - - - - - 528
34. The plaintiff obtained the common injunction after four proclamations had been made, under an exigent issued in an action commenced against him by the defendant; held that it was a breach of the injunction for the defendant to sue out a writ to compel the sheriff to make the fifth proclamation. [*Marsack v. Bailey.*] - - - - - 577
34. An order for referring a defendant's examination for impertinence cannot be obtained as of course, if the plaintiff has proceeded on the examination. [*Johnstone v. Ure.*] 578
35. A purchaser who has confirmed his report *nisi*, and then is served with a notice of motion to open the biddings, cannot confirm his report absolutely. [*Vansittart v. Collier.*] 608
- See EXECUTOR, 5. SOLICITOR, 2.
- PREROGATIVE.
- Devise of copyhold land in fee, upon condition that the devisee, within one month, pay 2,000 *l.* to the executor, to be applied for charitable purposes. The testator having left no customary heir, and no next of kin: held that the devisee took the land subject to the payment of the 2,000*l.* and that the Crown, and not the lord of the manor, was entitled to the 2,000 *l.* by prerogative, if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. [*Henchman v. Attorney General.*] - - - - - 498
- PRESUMPTION.
- A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the posses-

sion of the owner and his ancestors. [*Cooke v. Soltau.*] - 154

PRINCIPAL AND AGENT.

Bill to set aside the lease of a farm granted to a steward by his employer, dismissed with costs; although the lease was for a term longer than was usual on the estates, and was granted at the solicitation of the steward, on an agreement made before the subsisting lease had expired, and at a rent lower than was offered to the steward on behalf of the occupying tenant; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose, by the employer, and on a valuation made in the manner usual with that surveyor, and the offer of a higher rent being known to the employer before he executed the lease. [*Lord Selsey v. Rhoades.*] - - 41

PRINCIPAL AND SURETY.

If by neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged. [*Capel v. Butler.*] 457

PRO CONFESSO.

If there is only one defendant the bill may be ordered to be taken *pro confesso* on motion. [*Lewis v. Marsh.*] 220

PUBLIC POLICY.

Where a plaintiff filed his bill for an account of the captain's profits of a voyage to India in one of the Com-

pany's ships, to a share of which the plaintiff was entitled under an agreement with the captain, and it was alleged by the captain's executors that the agreement was made in consideration of the plaintiff having procured for the captain the command of the ship, this Court directed an issue to ascertain the consideration, reserving the question whether such an agreement would or not be void. [*Money v. Macleod.*] - - - - - 301

PURCHASER.

See ANSWER, 4. LEGACY, 8. BINDINGS. DEVISE, 2. COSTS, 4. 6. PENSION. PLEA, 6. 8. VENDOR AND PURCHASER, 3. 8.

RECEIVER.

1. Motion for a receiver by one tenant in common, against his co-tenant on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion. [*Tyson v. Fairclough.*] - - - - 142
2. A master's report of a receiver's account, like his report upon taxation of costs, does not require confirmation, and cannot be excepted to; but the Court will enter into the consideration of objections to the general principle on which the Master has proceeded in taking a receiver's account, but not of objections to particular items of it. [*Shewell v. Jones.*] - - - - - 170

3. The Court will appoint a receiver in India of a testator's assets on the application of an executor resident in England, but the receiver must give sureties resident in England. [*Cockburn v. Raphael.*] - - 453

RECONVEYANCE.

See TITLE, 1.

REFEREE.

Referees may take the opinion of a third person as evidence, but cannot previously agree to be bound by it. [*Hopcraft v. Hickman.*] - 130

REGISTER.

Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will be not be presumed that he had notice of any of the contents prior to that date. [*Hodgson v. Dean.*] - - - - - 221

REHEARING.

Where, by mistake, sums paid into court under the decree were included in the balances reported due from the defendant, and the decree on further directions ordered those balances to be paid into court: held that the mistake could not be rectified, without rehearing the cause on the latter decree. [*Brookfield v. Bradley.*] - - - 64

RELEASE.

A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it, and afterwards persuaded his

son to continue the trade against his inclination, whereby the son suffered great losses. The father on his death bed caused the promissory note to be burnt, and died intestate: held that the burning of the note amounted in equity to a release of the debt, and that the sum which remained due upon it was an advancement to the son. [*Gilbert v. Wetherell.*] - - - - 254

REMAINDER-MAN.

A trustee of a term for payment of debts purchased the inheritance from the tenant for life, and had it conveyed to him by fine and feoffment. The circumstance of the purchaser being trustee does not entitle the remainder-man to an account of rents, except from his entry to avoid the fine, nor if he neglects to claim for five years does it prevent his being barred. [*Reynolds v. Jones.*] - - - 206

REMOTENESS.

Settlement on husband and wife for their lives, remainder to the sons in tail male, remainder to the daughters in tail, remainder to the survivor of the husband and wife in fee, with the power to the wife if the husband survived, and all the children of the marriage died without issue, to charge the estate with 5,000 l.: held that the power is void for remoteness. [*Bristow v. Boothby.*] 465

RENEWAL OF LEASE.

See TENANT FOR LIFE, 1.

REPORT.

1. A master's report of a receiver's account, like his report upon taxation of costs, does not require confirmation, and cannot be excepted to; but the Court will enter into the consideration of objections to the general principle on which the Master had proceeded in taking a receiver's account, but not of objections to particular items of it. [*Shewell v. Jones.*] - - - 170
2. Where exceptions will lie to a Master's report, it must be regularly confirmed before any order can be made upon it. [*Scott v. Livesey.*] - 300

See EXCEPTIONS, 5.

RESIDUE.

Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found in the county of York, which upon a fair letting would produce a yearly rent equal to three and half per cent upon the amount of the purchase-money, and in the mean time the interest of his residuary estate to be accumulated: the tenant for life will be entitled to the interest of the residuary estate from the end of one year after the testator's death until it is laid out as directed. [*Kilvington v. Gray.*] 396

RESTRAINT OF MARRIAGE.

Devise of an estate to trustees upon trust to pay the rents and profits to the testator's son *A.* while unmarried, and to convey to him in case

of his marriage with the consent of the trustees, but in case he should marry against their consent, then to sell the estate, and divide the proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage, when they were informed of it: held that the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect.

[*Long v. Ricketts.*] - - - 179

See LEGACY, 5.

REVOCATION.

Testator devised his estates at *S.* and *H.* to trustees, in trust, if there should be only one son of *D.* who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees, in trust to sell. He afterwards drew his pen through the trust to sell, and, by a codicil, declared that he intended to erase the direction to sell only: he then gave all his estates to the son of *D.* who should first attain twenty-one, and change his name to *E.* *D.* at the death of the testator had a son who was still an infant, and afterwards had another son: held, that the codicil revoked the devise of the *S.* and *H.* estates, and also the devise of the residue of the estates to the trustees; and that *D.*'s eldest son took under this codi-

cil an immediate vested interest, both in the estates of which the testator was seised at the date of his will and those he purchased afterwards, and consequently was entitled to the rents during his infancy.

[*Duffield v. Elwes.*] - - - 544

SATISFACTION.

1. A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her: held that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund. [*Noel v. Lord Walsingham.*] - - - 99

2. A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a larger amount, in consideration of the natural love and affection he bore them; held that it was not a satisfaction of the debts. [*Drewe v. Bidgood.*] - - - - - 424

SEPARATION.

See HUSBAND AND WIFE, 4.

SEQUESTRATION.

Where a party is in custody of the Warden of the Fleet under process

from the Common Pleas, and is detained upon an attachment from this court, he must be brought up by *habeas corpus* to the bar of the court, and turned over to the warden of the Fleet before a sequestration can issue. [*Const v. Barr.*] 452

SET OFF.

The directors of a company assigned their salaries and shares to the company, to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain the salaries and dividends, and sell their shares for payment of their debts; one of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name: held that they passed to his assignees as being in his order and disposition, but that the company had a right to set off against the bankrupt's debt, the dividends and salary due to him at his bankruptcy. [*Nelson v. The London Assurance Company.*] 292

SETTLEMENT.

A will directed a settlement to be made of real estate on A. and his first and other sons in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: held that these last words did not authorize the insertion of a power to

charge with portions. [*Higginson v. Barneby.*] - - - - 516
See INFANT. WARD OF COURT.

SHIP.

See PUBLIC POLICY.

SOLICITOR.

1. A bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff, without any communication with the plaintiff himself, being dismissed with costs, the solicitor ordered to pay the costs, it appearing that the plaintiff had absconded before the bill was filed [*Hall v. Bennett.*] - - - - 78
2. Solicitor of a plaintiff, who had no interest in the subject of the suit, ordered to deliver up the papers in the cause to a co-plaintiff, to whom liberty was given to prosecute the suit. [*Rowlinson v. Halifax.*] 27

SPECIFIC PERFORMANCE.

1. Bill by a lessee for the specific performance of an agreement for a lease dismissed, because it was not filed until more than two years after the defendant had given notice to the plaintiff of his intention not to perform the contract on account of the latter not having fulfilled it on his part. [*Heaphy v. Hill.*] - - 29
2. Two surveyors who it had been agreed should fix the price of an estate, stated, in their valuation, the sum to be paid, and the quantity of land, and if it proved to be less, either 84 *l.* or 42 *l.* per acre should be deducted, according to the parts of the

estate in which the deficiency occurred, but did not state the quantity contained in each part: held that the valuation was uncertain, and that a specific performance could not be enforced. [*Hopcraft v. Hickman.*] - - - - - 130

3. Demurrer allowed to a bill for the specific performance of an agreement for a lease, entered into by the trustees of a numerous company for the use of the company, because none of the members of the company were parties to the bill. [*Douglas v. Horsfall.*] - - 184
 4. This court will decree specific performance of an agreement for separation between husband and wife, although the agreement was made on a compromise of indictments preferred by the wife against the husband and others, for assaults on her. [*Elworthy v. Bird.*] - - - 372
 5. The court will not entertain a bill for the specific performance of an agreement to refer to arbitration, nor substitute the master for the arbitrators. [*Agar v. Macklew.*] 418
- See* AGREEMENT, 2. VENDOR AND PURCHASER, 9.

STOCK.

Where a bill is filed merely to obtain a transfer of stock standing in the name of a trustee who is out of the jurisdiction of the Court, the order must be made at the hearing of the cause, and cannot be obtained by petition. [*Burr v. Mason.*] 11

SUBPŒNA.

1. Ordered that a defendant, a female infant not baptized, should be described in the subpœna as the youngest female child of the father and mother. [*Elcy v. Broughton.*]

188

2. It is not necessary to pray process against persons who are charged to be out of the jurisdiction of the Court. [*Haddock v. Thomlinson.*]

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3. If a person who is named as a defendant, but has never been served with a subpœna or appeared to the bill, appears by counsel at the hearing and consents to be bound by the decree, the defect is cured. [*Capel v. Butler.*]

457

SUIT, CONDUCT OF.

See SOLICITOR, 2.

TENANT FOR LIFE.

1. The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: held that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. [*Marsh v. Wells.*]

87

2. Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found in the county of York, which upon a fair letting would produce a yearly rent

equal to three and a half per cent. upon the amount of purchased money, and in the mean time the interest of his residuary estate to be accumulated: the tenant for life will be entitled to the interest of the residuary estate from the end of one year after the testator's death, until it is laid out as directed. [*Kilvington v. Gray.*]

396

TENANTS IN COMMON.

See RECEIVER, 1.

TENANT IN TAIL.

1. Although a fund of which a person is tenant in tail is subject to certain charges, the Court will, under the 39 & 40 Geo. 3, c. 56, order it to be transferred to the tenant in tail, after providing for the charges. [*In re Lord Somerville.*]

470

2. Tenant in tail in remainder (after estates to A. for life, and to the first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate, and dies without issue: the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to shew a contrary intention. [*Wigsell v. Wigsell.*]

364

TIMBER.

Whether the grantor of an annuity charged upon the rents and profits of an estate with the usual demise

to a trustee, has a right to cut timber for his own use and profit, the estate being inadequate to the charges upon it? Qu.. [*Fairfield v. Weston.*] - - - - - 96

TITHES.

See ISSUE.

TITLE.

1. Are conveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed, where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the possession of the owner and his ancestors. [*Cooke v. Soltau.*] 154
2. Where the title to an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract, without production of the will, or evidence of its contents. [*Stevens v. Guppy.*] - - - 439

See VENDOR AND PURCHASER, 3. 9.

TITLE DEEDS.

If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of the deeds. [*Fain v. Ayers.*] - - 533

TRUST.

A lease was granted to *W.* who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of *R.*; on the trial of an issue directed by the
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Court, it was found that *W.*'s name was used in trust for *R.*; held that the lease did not pass to *W.*'s assignees. [*Gardner v. Rowe.*] 346

TRUSTEE.

1. A trustee of a term for payment of debts purchased the inheritance from the tenant for life, and had it conveyed to him by fine and feoffment. The circumstance of the purchaser being trustee does not entitle the remainder-man to an account of rent, except from his entry, to avoid the fine; nor if he neglects to claim for five years, does it prevent his being barred. [*Reynolds v. Jones.*] - - - - - 206
2. Testator gave annuities to his trustees for their trouble in the execution of his will, and died possessed of several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not therefore loose their annuities. [*Wilkinson v. Wilkinson.*] - - - - - 237
3. Trustee in receipt of the rents and profits of a mortgaged estate, under an old conveyance of the equity of redemption, upon trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage. [*James v. Biou. Owen v. Flack.*] 600

TURPIS CONTRACTUS.

A bond for securing a provision for a woman who had been seduced by the obligor, and for her children, given after cohabitation determined, is good, notwithstanding the obligor

was married when the connection commenced. [*Knye v. Moore.*] 260

VENDOR AND PURCHASER.

1. If the Master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. [*Reynolds v. Blake.*] - - - - - 117
2. Two surveyors, who it had been agreed should fix the price of an estate, stated, in their valuation, the sum to be paid and the quantity of land, and, if it proved to be less, either 84 l. or 42 l. per acre should be deducted according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part: held that the valuation was uncertain, and that a specific performance could not be enforced. [*Hopcraft v. Hickman.*] 130
3. Where real estate is devised subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the mortgage or purchase money was not to be applied for the debts or legacies. [*Watkins v. Check.*] - - - 199
4. Where the purchaser upon entering into possession paid the amount of his purchase money to his banker, and gave notice that he was ready to invest it in such manner as the vendor should require, but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase money, except for four days, when it was a little less: the Court held the purchaser not liable for interest on the difference between his average balance, during the period in question and during the three preceding years. [*Winter v. Blades.*] - - - - - 393
5. Where the title to an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract without production of the will, or evidence of its contents. [*Stevens v. Guppy.*] - - - 439
6. Purchase money paid into court is the property of the vendor. [*Gell v. Watson.*] - - - - - 402
7. Where legacies were charged upon the real estates of a trader and his devisee and executor sold part of the real estates before the debts were paid: held that the purchaser, notwithstanding 47 Geo. 3, c. 74, was liable to see his purchase money applied in payment of the legacies. [*Horn v. Horn.*] - - - - 448
8. A plea of purchase for valuable consideration without notice, is no protection against an adverse claim, which the purchaser might have had notice of by using due diligence in investigating the title. [*Jackson and Wife v. Rowe.*] - - - 472
9. Specific performance decreed although the vendor's title was founded

- on the destruction of contingent remainders. [*Hasker v. Sutton.*] 513
10. If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of the deeds. [*Fain v. Ayers.*] - - 533
11. A purchaser under a decree is entitled to his costs where the Master reports against the title although there is no fund in court. [*Smith v. Nelson.*] - - - - - 557

WARD OF COURT.

The Court retains its jurisdiction over the property of a ward of the Court after the ward attains twenty-one, so long as the property remains in Court, and, if the ward marries, will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in Court or under a commission. [*Austen v. Halsey.*] - 123

WASTE.

1. Whether the grantor of an annuity charged upon the rents and profits of an estate with the usual demise to a trustee, has a right to cut timber for his own use and profit, the estate being inadequate to the charges upon it. Qu. [*Fairfield v. Weston.*] - - - - - 96
2. The reversioner of leaseholds with the privity of the tenant for life renewed the lease in his own name, and covenanted to repair the premises: held that he was to be considered as having entered into the covenant on behalf of the tenant

for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. [*Marsh v. Wells.*] - - - 87

WILL.

1. To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning. [*Mason v. Robinson.*] 295
2. Testatrix devised all her messuages, lands, tenements, hereditaments, and real estate to trustees, in trust to sell, and out of the produce to pay her funeral and testamentary expenses and legacies, except her charitable legacies, which she directed to be paid out of her personal estate legally applicable to that purpose, and not out of any part of her said messuages, lands, &c., which she might die seised or possessed of; and she also directed her trustees to keep separate accounts of the proceeds of her messuages, &c. and of her personal estate legally applicable for charitable purposes, and that, if the proceeds of her messuages, &c. should be insufficient to pay the legacies directed to be paid therewith, the trustees should apply her personal estate in payment of such legacies: held, 1st. that, notwithstanding the personal estate was more than sufficient to pay the charitable legacies, no part of it could be applied to pay the other legacies until the proceeds of the real estate were exhausted: 2d. that

- the testatrix's leaseholds passed to the trustees under the devise of all her messuages, &c.: 3d. that her heir and next of kin, and not her residuary legatee, were entitled to the surplus proceeds of her freeholds and leaseholds; and, 4th. that the freeholds having been properly sold in the heir's lifetime, the surplus was part of his personal estate. [*Dixon v. Dawson. Slawin v. Farside.*] - - - - - 327
3. Residuary devise of real and personal estate to all the issue, child or children of *M. F.* as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them, if more than one, to be divided share and share alike, when, and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns for ever, as tenants in common: held that the children living at the death of the tenants for life took absolute vested interests in the personal estate as well as in the real estate. [*Farmer v. Francis.*] - - - - - 505
4. A will directed a settlement to be made of real estate on *A.* and his first and other sons in tail, with powers of jointuring, leasing sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: held that these last words did not authorize the insertion of a power to charge with portions. [*Higginson v. Barneby.*] - - 510
5. Testatrix directed her legacies to be paid by her executor, to whom she afterwards gave all her real estates, and the residue of her personal estate after payment of her debts and funeral expences: held that the legacies were not charged on the real estates. [*Parker v. Fearnley.*] - - - - - 592
6. Held that a second will was made, if not wholly, yet as to the greater part in substitution of the first, from the similarity of the form and expressions of the two instruments and of the annuities and legacies, and from the gifts of two estates specifically devised. [*Hemming v. Gurrey.*] - - - - - 311
- See CONSTRUCTION, 2. 4. 5. DEVISE.
- WITNESS.
- Permission given to defendants, after decree, to examine a plaintiff as a witness, the Master having certified the necessity for so doing, and the plaintiff having no beneficial interest in the property in dispute. [*Hougham v. Sandys.*] - - 221

THE END.

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